I Do allow the Printing and Publishing of this BOOK, Entituled, *Tryals Per Pais*: Or, *The Law of* England, *concerning Juries by* Nisi Prius.

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Tryals Per Pais:

OR, THE

LAW of ENGLAND

CONCERNING

JURIES

BY

NISI PRIUS, &c.

Newly Reviſed, and much Inlarged; With an Addition of Precedents, and Forms of Challenges, Demurrers upon Evidence, Bills of Exception, Pleas *Puis le Darrein Continuance*, &c.

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By *G. D.* of the *Inner-Temple*, Eſq;

Per teſtes ſolum, lex ipſa nunquam litem dirimit, quæ per Juratam xij. hominum *decidi poterit. Cum ſit modus iſte ad veritatem eliciendam multo potior, & efficacior, quam eſt forma aliquarum aliarum legum orbis.* Forteſcue. Cap. 31.

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Radcliffe Trustees

To the Practicers of the Law.

Gentlemen,

IN the Dedication of Books, ſuch perſons ſhould be choſen whoſe Studies and Profeſſion agree with the nature of the Subject. To prove Concluſions *in one* Science, *by the* Heterogene Principles *of another: To make a* Grammarian *Patron to a piece of the* Mathematicks: *To Dedicate a Treatiſe of* Logick *to a Maſter of* Muſick; *or a Matter of* Practice, *to a Man of* Speculation; *would not only be improper, but abſurd. You know that in the whole Practice of the Law, there is nothing of greater Excellency, nor of more frequent Uſe, than Tryals by* Juries. *In this, our Common-Law (and not without juſt cauſe) values it ſelf beyond the* Imperial Law, *before the* Canon Law, *or any other* Laws *in the World. And ſeeing the hopes and life of all*

the Proceſs, the force of the Judgment and the Truth, nay the Right of the Parties lie in the Tryal; for as one Elegantly ſays, Qui non probat, *at the Tryal,* dicitur veritate & jure carere, *and indeed the knowledge of all the* Law *tends to this: for without Victory at the Tryal, to what purpoſe is the Science of the* Law? *The Judge can give no Sentence, no Deciſion without it, and muſt give Judgment for that ſide the Tryal goes; therefore I may well ſay, 'tis the chief part of the Practice of the* Law: *And if ſo, to whom ſhould I offer this Treatiſe, but to you the Practiſers?*

I need ſay nothing for ſmall Tracts and Treatiſes; the infinite number of them in the Civil Law *(there being for every Title a diſtinct Tract) nay the number of them in our Law, ſufficienly ſhew their Uſe.*

Joachimus Forbus Ringelbergius *in his Book* De Ratione Studij, *giving directions what Books Students ought*

ought to carry with them, when they change places, and travel from one to another, tells us, That out of the Volums (by reaſon of their bigneſs not portable) he uſed to tear out ſeveral leafs and take them with him in his Journeys, and ſo he ſaid he had ſerved the Works of Pliny, Tully, Plato, Demoſthenes, *&c. although he had given great prices for them; which juſtifies the writing of this Treatiſe, the ſubject matter thereof being of ſuch general uſe in all Circuits.*

When I read the elaborate Books of Farinacius de Teſtibus, *and the three Exquiſite and incomparable Volums of* Maſcardus de Probationibus, *in the Cæſarian and Pontifical* Laws, *(which Works were ſo valued and eſteemed, that they were looked upon as new lights ſent from Heaven, by the profeſſors of thoſe* Laws:) *I could not but ſee the defect and want of ſuch Books in our Law: for ſurely they are as neceſſary in the one as in the other.*

And altho' I cannot compare my weak Endeavours with those Excellent and Methodical Works, theirs being intire, this only quasi *an Abridgment, fitted for use, not for show: Yet until more learned and judicious Proficients in in our Law shall undertake the Work, I thought fit to produce mine.*

To compare this sort of Tryal by Jury, *with the Tryals of other Laws and Countries, and declare how much and wherein it excels 'em all, after* Fortescue de laudibus, *&c. and his learned* Commentator; *would be like the arrogance of Limning after* Apelles, *and requires the room of a Volume, rather than an Epistle. And considering my own insufficiencies, I shall praise it more by saying nothing, than all I can: for to say less than a thing deserves, would be, instead of an Encomium, a disparagement. Therefore I shall content my self, only to say, That Tryals in other Laws are by Witnesses only, privately examin'd; This, by Witnesses pub-*

publickly examin'd and confronted; and by Jury *also, and so consequently the fact is setled, with the greater certainty of truth, upon which the uprightness of the judgment depends.*

It would be well if there were less corruption in the returning of Juries; *but I think 'tis parallel'd, if not exceeded by that of examining Witnesses privately, on whose Depositions, the Tryals in other Laws consist: And so that must be no Objection against the thing. I hope an Expedient may be found out to prevent the Corruption in returning* Juries, *but I believe it never can in the other.*

To say this Tryal by Jury *is too popular in a Monarchy, would be a good Objection from a French-man, but not of any English-man, who lives under the best tempered Monarchy, and the best sort of Government in the World, to which this manner of Tryal is so proper and well Accommodated, that neither the Wisdom of our Ancestors could,*

could, nor (I may say) can this present, nor after Ages invent a better.

But as the unskilful Painter *drew a Curtain, before what he could not express with his Pencil, so must I vail with silence, the Excellencies of this Celebrated* Tryal, *which I am not able to delineate.*

Gentlemen,

To make an Apology for the stile of a Law-Book, especially of an Epitome, would be a vain thing, Ornari res ipsa negat contenta doceri; *neither shall I make any Apology for my undertaking this Work: If 'twas better perform'd, yet* Momus *wou'd be carping; and if 'twas worse, it wou'd be good enough for him, who cannot, or will not do it better: Be it what it will, your kind Reception will abundantly satisfie*

Your Servant,

G. Duncombe.

THE

THE PREFACE TO THE FIRST EDITION.

THE Philoſopher could not ſee a Man unleſs he heard him ſpeak; *Loquere ut videam.* Speech is the Index of the Mind, and the Mind only diſcriminates the Man. For, although an *Ideot*, who hath but the ſhape of a Man, may with ſilence ſo hide his Folly, that ſtrangers to his Manners cannot diſcern him from a Sophiſter: Yet doubtleſs, Silence is the greateſt Enemy to Learning, the Grave wherein Oblivion buries the Parts and Knowledge of the braveſt Spirits.

Where-

Hiſtor. facil. Princeps.

Wherefore Learned *Saluſt*, from this takes his Exordium; *Omnes homines qui ſeſe ſtudent præſtare cæteris animalibus, ſumma ope niti decet, ne vitam ſilentio tranſeant, veluti pecora:* Thoſe Men who would excel Beaſts, ſhould labour that their Lives might not paſs in ſuch ſilence, as Beaſts do. It ſeems he deemed that Man little inferior to a Beaſt, who acted nothing to prolong his Memory: For this he held to be the Duty of every Man, ſaying, *Quo mihi rectius eſſe videtur, ingenii quam virium opibus gloriam quærere; & quoniam vita ipſa, qua fruimur, brevis eſt, memoriam noſtri quam maxime longam efficere:* In my Opinion, 'tis far better to acquire Glory by the Riches of Wit, than Strength; and becauſe our Lives are ſhort of themſelves, we ſhould indeavour by Ingenuity to Eternize their Memory.

Nulla dies ſine linea.

And to effect this, *Nulla dies abeat, quin linea ducta ſupersit*; No day ſhould paſs over our Heads wherein we ſhould not act ſome memorable Exploit: Men ſhould not live like *Snails*, never ſtirring out of their Houſes; but be active (I mean not buſie-bodies in other Mens matters, but) in their

their own Callings, of which the Wise *Cato* tells us, *Every Man should give a reasonable Account:* And if we believe the famous *Seneca*, *Nihil est turpius quam grandis natu senex, qui nullum habet vitæ suæ argumentum, quo dim se vixisse dicat, præter ætatem:* Nothing is more unworthy than an old Man, who has nothing to shew for his Antiquity, but a Gray Beard; whose Soul served only as Salt to keep his Body sweet, and is no sooner dead, than forgotten, long before he is half rotten; yet who is so apt to deride the Endeavours of other Men, as this Ancient *Ignoramus*, whose wrinkles in his Face, worn-out Looks, and many Years, sway more with the vulgar People, than all the Arguments of Law or Reason? Had *Seneca* been such a silent *Momus*, the World would never have been blest with his so Learned Works. And doubtless writing Books is needful in no Science more than in the Law. For without Books, how would the Lawyers do for Arguments at the Bar, or Resolutions at their Chambers? whence the Oracle Sir *Edward Cook* pronounces this, *Omnes debere Juris-prudentiæ libris componendis animum adjicere:* That all Men ought to addict

dict themſelves to the Compoſing Books of Law; ſome to the Reporting of the Judgments and Reſolutions of the Judges, who are *Lex Loquens*; and ſome to the Collecting of theſe Caſes and Reſolutions, methodizing and fitting them for ſome particular purpoſe, as *Littleton*, *Stamford*, *Fitzherbert*, *Crompton*, *Perkins*, *Finch*, &c. And indeed, moſt of the Law-Books extant, if not all (ſetting aſide the Reports) are nothing elſe, but Collections out of others. This I ſpeak, not in derogation of them, in the leaſt; for as 'tis equally, if not more laborious, ſo 'tis full as glorious, judiciouſly to cull Authentick Caſes out of the Volums of the Law (where ſo many are no Law) and rightfully place them in a particular Treatiſe, as 'tis to Report the Judgments and Reſolutions from the mouth of the Court; for the Reporter is but the Courts Secretary, and *Cook*'s Inſtitutes merit as much as his Reports; and *Aſh*'s Tables, *Fitzherbert* and *Brook*'s Abridgment are as uſeful as the Year-Books themſelves, of which kind of Collections, one Elegantly thus breaks out, *Quo quidem beneficio, haud ſcio, aut aliud aut legum*

Can-

Candidatis magis gratum, aut Reipublicæ magis commodum, aut divini honoris illustrationi magis idoneum, vel cogitando quidem consequi, quisquam poterit. Than which benefit I know not whether any Man can even imagine another, either to Lawyers more grateful, or to the Commonwealth more profitable, or for the Illustration of Divine Honour more fit. For with the least Labour, a small Price, and little Time, they present you with those Resolutions and Judgments which lye scattered in the Voluminous Books of the Law; which would otherwise cost much Time, Pains and Charges to find out. The thoughts of which publick good, first gave life to these Endeavours of mine: Not that any one should in the least imagine, that I am so guilty of vain Ostentation, as to believe, that my Parts or Abilities can perform any thing in this kind like other Men: No, *Ipse mihi nunquam Judice me placui.* I could never yet please my self with my own Labours, much less are they worthy to please others; *haud equidem tali me dignor Honore.* However, when I consider, that no Man hath yet written particularly concerning

cerning this Subject, and of what general Use it is; I doubt not but that this Treatise will receive a favourable Construction from most men, and a plausible Acceptation from others.

The use of the Book.

The Use of it is in a manner Epidemical; since most mens Lives and Estates are subject to that Tryal *Per Pais*, here demonstrated; but in particular, the Practisers at Law (especially *Circuit-Advocates*, *Attornies*, *Solicitors*, *Clerks*, &c.) And all *Jurors*, (for whose Directions it is of singular Use) are chiefly concerned herein. But I will not hang a Bush out, to invite, and prepossess your Judgments, *Vinum est Utilitas*. The profit which every ingenious Reader shall gather out of it, will speak more for it, than the best Eulogical Preface.

And for my own part, I profess my self to be *Philomathes*, but not *Polymathes*. And notwithstanding the hard-favoured Objections which some men cast upon it, I really think the Study of the Law, to be the most pleasant Study in the World. And he which delighteth in the Study of any other Art or Science, must consequently be delighted with this. For the knowledge

ledge of the Law, as *Doderidge* ſaith, is moſt truly ſtiled, *Rerum Divinarum humanarumque ſcientia*, and worthily imputed to be the *Science* of *Sciences*; for therein lies hid the Knowledge of every other Learned Science.

So that he which gives himſelf to the Study of Divinity, may here fill himſelf with holy and pious Principles of Divine Laws: For, *Lex eſt ſanctio ſancta, jubens honeſta, & prohibens contraria; ſanctum etenim oportet, quod eſſe ſanctum definitum:* The Law is a holy Sanction, or Decree, commanding things that be honeſt, and forbidding the contraries: Now the thing muſt needs be holy, which by definition, is determined to be holy. So that in this reſpect, ſaith *Forteſcue*, men may well call Lawyers, *Sacerdotes*, that is, givers or teachers of Holy Things. For the Laws being Holy, it follows that the Miniſters and ſetters forth of them, muſt be givers of Holy Things; and ſo by Interpretation doth *Sacerdos* ſignifie; and doubtleſs he which, duly conſiders thoſe Rules of *Theology*, which lye ſcattered throughout the whole Body of the Law, muſt needs conclude our Laws to be Commentaries upon the Old and New Teſtament; and do ſo

Forteſcue, Cap. 3.

much bear the Image *Legis Divinæ*, that they may well be attributed to the moſt High.

The Rules of *Grammar*, *Philoſophy Natural*, *Political*, *Oeconomick* and *Moral*; as alſo the Grounds of *Logick*, and of other Arts and Sciences, ſo much abound in our Books, that the very reading of the Law will make a man *Maſter* of thoſe Sciences.

And ſince *Rhetorick* is, *Ars ornate dicendi*, and conſiſteth of thoſe two parts, *Elocution*, and *Pronuntiation*; How can we read in our Law-Books, thoſe learned Arguments, Elegant Speeches and Judgments, pronounced with ſuch Eloquence and Elegance of words and matter, and not conclude, That Rhetorick is the Glory and Grace of a Lawyer? though ſome (not gifted that way) would perſwade us, that the Law hath little relation to it.

If any man be delighted in Hiſtory, let him read the Books of Law, which are nothing elſe but Annals and Chronicles of things done and acted from year to year, in which every Caſe preſents you with a petit Hiſtory; and if variety of matter doth moſt delight the Reader, doubtleſs, the reading of thoſe Caſes, (which differ like mens faces)

faces) though like the Stars in number, is the moſt pleaſant reading in the World.

I thought to have expatiated my ſelf in this Eulogical Commendation of the Study of the Law; but when I conſider the Glory of the thing it ſelf, I think it but in vain to light the Sun with Candles; and as no Arguments will perſwade one to love againſt Nature; ſo he whom the excellency of the Law it ſelf cannot invite to Study it, will never be forced to it with the fiſt of Logick, or other perſuaſion: Wherefore 'tis now time to expoſe my ſelf to the Cenſure of the Reader, who always judges according to his Capacity or Affection; for which cauſe, if I were to chuſe my Reader, I could wiſh with *Caius Lucilius*, *Quod ea quæ Scribo, neque ab indoctiſſimis, neque a doctiſſimis legi, quod alteri nihil intelligerent, alteri plus fortaſſe, quam ipſe de ſe:* That this Treatiſe might not be read of the moſt learned, nor of thoſe who are not learned at all, becauſe theſe underſtand nothing, and the others more perhaps than my ſelf.

Bracton, Lib. 1. Fol. 1.

However, I put this Requeſt to all, *Ut ſi quid ſuperfluum, vel perperam poſitum in hoc opere intervenerit, illud corrigant, & emendent, vel Conniventibus oculis pertranſeant: Cum omnia habere in memoria, & in nullo peccare, divinum ſit potius quam humanum*: That if any thing be ſuperfluous, and placed amiſs in this Work, That they will either correct and amend it, or without carping connive at it; ſince to remember to do all things right and nothing amiſs, is rather the part of a God than Man: Wherefore, let him which never offended, caſt the firſt ſtone.

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Try-

Tryals per Pais.

CAP. I.

The Derivation of the Word [*Jury.*] The Definition, Antiquity and Excellency of Juries.

JUrie (Jurata) cometh of the French word [Jurer, i. e. Jurare.] And signifieth in Law, those twelve Men who are sworn Judges in Matters of Fact, evidenced by Witnesses, and debated before them: I call them Judges, because, as 'tis the property of the Court, jus dicere; so 'tis in the power of the Jury to determine the fact, upon an Evidence Pro and Con; according to those common Adagies, Ad quæstionem Juris respondent Judices; Ad quæstionem facti respondent Juratores: And as the Judgment of the Court ought to be guided by the Law, so is the Verdict of the Jury by the Evidence. They of the Jury are called Juratores, Jurors, a Jurando, as in ancient Laws Sacramentales a Sacramento præstando. *Vid.* Cap. 12. Jurie. *Vid.* cap. 15.

The Antiquity and Excellency of Juries.

I need not here divide and shew the differences of Juries, nor the several sorts, they being so well known, viz. The Grand Jury, or Great Inquest, and Petty Jury, or Jury of Life and Death, in Criminal Causes, and in Civil Causes the Assize Jury. Inquest of Office, by some called Inquest of Jury, and Inquest of Office. Something concerning each of these, will incidently be spoken of in what follows. As to the excellency of Juries, it appears from their Antiquity.

Sir Henry Spelman, verb. [Inquestio] says, Tryal by Juries was used in England, Normannis nondum ingressis, Leg. Ed. Confess. ca. 38. Postea inquisisset Justitia, i. e. [Justitiarius] per Lagamannos, i. e. [legales homines] & per meliores homines de Burgo, vel de Villa, vel de Hundredo, ubi mansisset Emptor, &c.

For as to Tryal by twelve Men, though Mr. Daniel and Polydore Virgil deny it to be older than the Conquest, and the latter says there is no Religion in it, but in the number; yet he stands fairly corrected, by that Excellent and Learned Antiquary, Mr. Camden p. 153. who says, Whereas Polydore Virgil writeth, That William the Conqueror first brought in the Tryal by twelve Men, there is nothing more untrue; for it is most certain and apparent by the Laws of Ethelred, that it was in use many years before, &c. And whereas Lamb. verb. [Centuria] says, In singulis Centuriis Comitia sunto, atque liberæ Conditionis viri duodeni, ætate superiores, una cum præposito Sacra tenentes jurento,

se

ſe adeo virum aliquem innocentem haud damnaturos, ſontemve abſoluturos, he refers to the Laws of Ethelred, cap. 4. cited by the learned Spelman, verb. [Jurata.]

And to the ſame doth my Lord Coke refer, Com. ſuper Lit. 155. and Preface to his third and eighth Report. And as to the Religion in the number of twelve, my Lord Coke gives inſtances ubi ſupra, and Sir Henry Spelman, in verb. [Jurata] ſupra, makes addition thereto.

So that I may truly ſay, Tryals by Juries have been uſed in this Nation, time out of mind, and were contempozary and coeval with the firſt Civil Government thereof and Adminiſtration of Juſtice; for amongſt the firſt Inhabitants, the Britains, the Freeholders were uſed in all Tryals.

And Tryal by Juries was (as you ſee practiſed by the Saxons) continued by the Normans, and confirmed by Magna Charta. And was ever ſo eſteemed and prized in this Iſland, that no Conqueſt, no change of Government ever prevailed to alter it.

'Tis true, Tryals by Juries before the time of H. 2. were not ſo frequent, becauſe Sadæ or Purgationes, Ordalia, Tryals by hot Iron, hot Water, cold Water, Duels, and other ſuperſtitious ways were then in uſe; but Tryals by Juries were here in the Saxons time, and were found here, and not brought in by William the Conqueror from Normandy: nay, rather ſetled by Edward the Confeſſor in Normandy, where he a long time was, and taught many Laws, as you

may see in the Book of the Customs of Normandy.

Glanvil lib. 2. cap. 7. says, Ex æquitate autem maxima prodita est legalis ista institutio, speaking of these Tryals in opposition to Duels, &c.

The use of Juries.

Their general use (being the only Tryers of Choses in fait, almost in all Courts throughout England) speaks them a publick good. To be Tryed by ones Peers is the greatest priviledge a Subject can wish for; and so excellent is the constitution of the Government of this Kingdom, that no Subject shall be Tryed but by his Peers. The Lords by theirs, the Commons by theirs, which is the Fortress and Bulwark of their Lives, Liberties and Estates; and if the good of the Subject be the good of the King, as most certainly it is, then those are Enemies to the good of the King and State, who attempt to alter or invade this Fundamental Principle, in the Administration of the Justice of this Realm, by which the Kings Prerogative has flourished, and the just Liberties of the People have been secured so many Ages.

And what answer shall I make to the Princes, vehementer admiror, videlicet, Wherefore are not Juries used in other Countries, if they are so good? but that of Forteſcue, the Learned, who best could tell, scil. That other Countries can scarce produce one Jury so well accomplished with Wealth and Ingeny, as one County, nay, one Hundred can in England.

Forteſcue ca. 29.

But

But not to dwell in the Porch, I will addreſs my ſelf to the Gravity of the Law, where you muſt not ſo much expect the flaſh of Rhetorick as the light of Reaſon; no, the Law knows beſt how to expreſs her ſelf in her own Terms; wherefore all other Sciences muſt learn, with reverence, to keep their diſtance, and, as (as the Golden Finch ſings) be glad to have their ſparks raked up in her Aſhes.

Things, not Words, moſt regarded in the Law.

Finch. c. 3.

And ſince an Iſſue is previous, and the matter of a Tryal, I ſhall firſt give you the deſcription thereof, and then touch upon the ſeveral Tryals allowed by the Law, for the diſcuſſion of the truth.

CAP. II.

Of an Iſſue, and the divers ſorts of Tryals thereof; and when a Tryal ſhall be by a Jury, and when not; when by Certificate, when by the Spiritual Law, when by Battail, and when by an Almanack; what Iſſue ſhall be firſt tryed, *per pais*; what ſhall be tryed by the Court; and what by Examination of the Attorny, Sheriff, *&c.*

1 Inſt. f. 126. *Omnia unum aliquem ſortiuntur exitum, vel per patriam, vel per Judices terminandum.* Finch. Epiſtle.

Iſſue, exitus, ſaith Coke, is a ſingle, certain and material point, iſſuing out of the Allegations and Pleas of the Plaintiff and Defendant, conſiſting regularly upon an Affirmative and Negative, to be tryed by Twelve Men: And it is two-fold, ſcil. either ſpecial, as where the ſpecial matter is pleaded; or general, as in Treſpaſs Not Guilty: In Aſſize, nul tort, nul diſſeiſin, &c. And as an Iſſue natural cometh of two ſeveral perſons, ſo an Iſſue legal, iſſueth out of two ſeveral Allegations of adverſe parties.

Tryals.

And to give you likewiſe his definition of Tryal, It is to find out, by due examination, the truth of the point in iſſue, or queſtion between the parties, whereupon Judg-

Judgment may be given: and as the question between the Parties is two-fold, so is the Tryal thereof; For either it is quæstio juris, (and that shall be tryed by the Judges either upon a Demurrer, Special Verdict or Exception: For, Cuilibet in sua arte perito est credendum, & quod quisque noverit, in hoc se exerceat.) Or it is quæstio facti, And the tryal of the fact is in divers sorts; First, chiefly, and most commonly, by a Jury of twelve Men, (of which kind of tryal, my intention is principally to treat in this Book.)

Note, That upon a Demurrer to part, and Issue to part, though it is the best way to give Judgment upon the *quæstio juris* first, yet the Court may try the *quæstio facti* first, at their discretion. 1 *Inst.* 72. 125.

Lach 4. Rolls tit. Tryals, 626. 723.

For by twelve Men are matters of Fact (for the most part) tryed with us in England, in Causes both Criminal and Civil; in Causes Civil, after both Parties have said what they can, one against another, in Pleading, if there arise a question about any matter of Fact, it is referred to twelve indifferent Men, to be Impannelled by the Sheriff, and as they bring in their Verdict so Judgment passeth. And this the Judge is to declare as the Law is upon the Fact found: For the Judge saith, the Jury finds thus, and then the Law is thus, and so we judge. For the Law arises upon the Fact.

Proceedings in Civil Causes.

For Criminal Causes, the course is thus; At the Kings-Bench for Middlesex, and at the great and general Assizes, and at the general Sessions of the Peace, there is one Jury called the Grand-Jury, which consists commonly of twenty four substantial Men, out

Proceedings in Criminal Causes.

of every Hundred within the County returned by the Sheriff, and they are to consider of all Bills of Indictment presented to them, which they either approve of by writing Billa Vera, or disapprove by writing upon them Ignoramus; and those which they approve of are to be tryed by another Jury called the Petit-Jury. Or the Grand-Jury may charge any person, upon their own Presentment, which will be of the force of an Indictment, and the Party charged may Traverse the Offence, and bring it to be tryed by a Petit-Jury.

Some lesser Matters in these Courts are proceeded upon without a Jury, and some things are removed by Certiorari into higher Courts, and then must be tryed there; and that thing to which there is a Traverse put in, must be tryed and ended by a Petit-Jury which (for the most part) in all Civil and Criminal Causes are but twelve Men, which ought to be Free-Men, not Villains or Aliens, and lawful Men, not Outlawed, and also Men of worth and honesty. 7.

But because it is necessary to be known, that there are many ways allowed by the Common-Law to try matters of Fact, besides this by Juries, I will here repeat some of them: And for this first hear the Oracle, who tells you, that he had read of six kinds of Certificates allowed for Tryals by the Common-Law.

2 Inst. f. 74.

Tryals by Certificate.

1. The doing of Service by him that holdeth by Escuage in Scotland, was to be tryed by the Kings Marshal of his Army,

Per

Per ſon Certificate en eſcript ſouth ſon ſeal que ſerra mis a les Juſtices, ſaith Littleton.

2. If it be alledged in avoidance of an Outlawry, that the Defendant was in Priſon at Burdeaux, in the ſervice of the Mayor of Burdeaux, it ſhall be tryed by the Certificate of the Mayor of Burdeaux. Note, this was when Burdeaux was parcel of the Dominions of the King of England. Rolls tit. Tryal, f. 583.

3. For matters within the Realm, the Cuſtom of London ſhall be certified by the Mayor and Aldermen by the mouth of the Recorder. vide apres 17.

4. By the Certificate of the Sheriff, upon a Writ to him directed, in caſe of Privilege, if one be a Citizen or Foreigner.

8. 5. Tryal of Records by Certificate of the Judges, in whoſe Cuſtody they are by Law. All theſe be in temporal Cauſes.

6. In Cauſes Eccleſiaſtical, as Loyalty of Marriage, general Baſtardy, Excommengement, Profeſſion: Theſe and the like, are regularly to be tryed by the Certificate of the Ordinary, vide apres 16.

If the Defendant claim his Privilege as a Scholar of the Univerſity of Oxon, of ſuch a College or Hall: this ſhall not be tryed by Certificate, but per pais. Rolls tit. Tryal. 583.

Concerning Certificates of Spiritual Perſons, vide Rolls ibid. 591, 592.

7. A

Records.

7. A Record shall be tryed by the Record it self, and not per pais. But matter of fact concerning a Record is tryable by a Jury, as whether a Plaint, &c. was levied according to the Custom; & non prosecutus est ullum breve, is tryable by the Country. Hob. 244. Hutt. 20. So if a Statute hath two Seals, or but one, 1 Leon. 229. 2 Cro. 375. 1 Inst. 125. b. So in a per que servitia, if the Tenant say he held not of the Conusor jour del note levie, shall be tryed per pais. In Escape upon a Capi returned, ne unques in son gard, shall be tryed per Record; but upon a Capias not returned, the mesne shall be tryed per pais. So shall an Action brought by Covin, for the Covin is not of Record. In a scire facias per Roy to have execution of a Judgment in a Quare impedit, if the Defendant say, That after the Recovery the King presented, & issint Judgment execute, and the issue be whether the King presented, per cause del Judgement, or of an avoidance after the death of J. S. who was presented by a stranger after the avoidance, upon which the King had Judgment; this shall be tryed per pais. And for this reason, in pleading of Letters Patents, the place need not be alledged where the Letters Patents were made, because the Defendant cannot plead nul tiel Record, but must plead, non concessit, and then the Jury shall come from the place where the Lands lie. Vide li. 6. f. 15. 1 Inst. 117, 260. Plo. Com. 231. But upon a Non est factum pleaded to a Deed, there must be a place alledged where the Deed was made, because (though the Deed, as to the matter of Law, be

Mixt with fact.

Rolls tit. Tryal. 574.

Why there needs no *visne*, where Letters Patents were made; otherwise in pleading Deeds. 4 Rep. 71.

be tryable by the Court, yet) the sealing and delivery thereof, and other matters of Fact must be tryed by the Jury; so that in this Case of a Deed, there is a Tryal per Pais, and by the Court. 1 Inst. f. 35. Vide apres 18. Deed.

The issue upon an Indictment or Acquittal upon this shall be tryed by the Record. So shall the allowance of a Protection in Bank. The Imprisonment upon the Execution, and not for other cause, in escape. The justification of an Imprisonment, because he is a Justice of Peace. A Statute-Merchant, Count or not Count, Baron of the Parliament, or Vicount or not. Whether a place be within the Ligeance of the King of England, or in Scotland. A Fine for release rendring his Body in discharge of his Bail, shall be tryed by the Record. Rolls tit. Tryal 574. What issues shall be tryed per Record. 2. 4. 6. 9. 13. 15. 16 26 27. 28

But in Escape against the Mayor of a Staple for suffering J. S. in Execution upon a Statute Staple to go at large, if the Defendant say he was not in Prison upon the Execution, but upon a Plaint there, this shall be tryed per pais and not per Record, because 'twould be unreasonable that the Defendant should certifie a Record, where he himself was concerned. ibid. The time of inrolling Letters Patents shall be tryed per pais. Co. Lib. 4. 71. 9 H. 7. 2. What per Pais. 12. 10.

Disseisin of an Office in any Court, or rasing a Record in any Court, by the Filizers and Attornies of the Court. Office rasing a Record.

8. A

Peers. The Lords may command a Jury to be Impannelled to try misdemeanors.

8. A Peer of the Realm, i. e. a Lord of the Parliament shall upon an Indictment of Treason or Felony, misprision of Treason, and misprision of Felony, be tryed by his Peers, without Oath, 1 H. 4. 2. But in Appeal at the Suit of the Party, he shall be tryed per probos & legales homines Juratores. 10 E. 4. 6. &c. because that is not the Kings Suit, but the Parties. Vide lib. 9. 31. Le case del Abbot de Strata Mercella. And in a Præmunire, his Tryal shall be per pais. Bolstr. 1 part. 198. Dutchesses, Countesses, or Baronesses, although Married, shall be tryed as Peers of the Realm are, but so shall not Bishops and Abbots. Stam. 153. 20 H. 6. 9. 2 Inst. 48, 49, 50. 156. b. 294. 2 Inst. 30. But Bishops shall be tryed by the Peers in Parliament.

12 Rep. 93. Lamb In f. 520. 3 Inst. 30.

(F)

Customs of Courts, &c. tryed by the Judges.

9. The Customs and Usages of every Court shall be tryed by the Judges of the same Court, if they are pleaded in the same Court, ibid. and many other things are tryed by the Judges, as the reasonableness of a Fine of an Offender, or upon Surrender of a Copy-hold Estate; and so it is of Customs, Services, and also of the time that a Tenant at will shall have to carry away his Goods; and these Cases come under the Rule which makes matter of Law to be tryed by the Judges; vide 1 Inst. f. 56. And in some Cases matter of Fact shall be tryed by the Judges, as if the Plaintiff appear by Attorny in Court, and then the Defendant pleads that the Plaintiff is dead; If one appears, and saith he is the Plaintiff, whether he is or not, shall be tryed by

(F. 2)

11. the

the Judges lib. 9. 30. So the Non-age of an Infant, generally by inſpection of the Court. But in many Caſes Infancy ſhall be tryed per Pais, as if an Infant appear by Attorny, in Error, this ſhall be tryed per Pais, li. 9. 31. and ſo it is in an Ætate probanda. Inſpection. V. Bulſt. 1 par. 131. Rolls Tit. Tryals 571.

Maihim, In an Appeal of Maihim the Court may adjudge this upon the View, at the prayer of the Defendant, and this Tryal is peremptory to the Parties, by a Jury of Chirurgeons. Vide Rolls Tit. Tryals 578. Maihim.

Maihim may be tryed again by the Court, by inſpection for increaſe of Damages; but then theſe things are to be conſidered, Firſt, It muſt be a Maihim, and not a bare Wounding. Secondly, The Maihim muſt be aſcertained in the Declaration, ſo as that it may appear that the Maihim inſpected, and the Maihim in the Declaration be all one, as was reſolved, Mich. 21 Car. 2. B. R. in the Caſe of Badwel and Burford, the principal Caſe of which was, That the Defendant whip'd the Plaintiffs Horſe, which made him throw her, and another Horſe trod on her, and maim'd her Hand, and adjudged no increaſe of Damages in that Caſe being a conſequential, and not a direct Maihim. Maihim.

Non-age in a Writ of Error to reverſe a Judgment or a Fine of the Tenant by reſceit of one vouched come deins age, & iſſint praie le parol a demurrer, Non-age ſur aid praier in Appeal, Audita Querela, to avoid a Statute, Recognizance, Accompt, and in all Actions where 'tis prayed that the parol de- Tryal by Inſpection becauſe of Record.

demurroit, Non-age shall be tryed per Inspection. But in Accompt against one of full Age, if he plead Non-age when he was Bayly, this cannot be tryed by Inspection, Rolls Tit. Tryals 572. how this Tryal by Inspection shall be, vide Rolls ibid. at large. 12.

In all Cases where the matter may be tryed by Inspection, Examination or Discretion of the Justices, if they doubt the matter, they may refuse to try this, and compel the Parties to a Tryal per Pais, or other proofs, 21 H. 7. 40. per touts Justices.

Tryals by Witnesses and Proofs.

10. There are many Tryals allowed by the Common Law, by Witnesses only, without a Jury, as of the life and death of the Husband in Dower, so the proof of a Summons, or the Challenge of a Juror, must be tryed by Witnesses; and regularly, the proof ought to be by two or three Witnesses, 1 Inst. 6. and divers other things must be tryed by examination of the Parties and Witnesses, as the Tryal by Wager of Law, &c. Finch 423. V. 4 Inst. 278.

Glanvil lib. 13. cap. 18.

Non-age was antiently tryed by the Verdict of eight Men, but now by Inspection, and full age by twelve Men.

Appeal.

In a Appeal by a Feme of the death of her Husband, if the Defendant say that the Baron is alive in another County, or generally, that he is alive, this shall be tryed per proofs, 41 Assise 5. Vide Rolls Tit. Tryal 577. what shall be tryed by proofs in an Assise, and what not.

In

In a Writ of Annuity if the Defendant say the Party is dead in Britain, this shall be tryed per proofs, 46 E. 3. 70. Annuity.

11. Duke or no Duke, Earl or no Earl, Baron or no Baron, shall be tryed by the Kings Writ, lib. 5. 35. lib. 6. 53. But Dutchess or no Dutchess, &c. by Marriage, shall be tryed per Pais, because the Marriage is matter of fact. Dukes, &c.

12. In a Plea del alien nee, the League between the King and the Sovereign of the Alien, shall be tryed by the Record of the Chancery, for every League is of Record, lib. 9. 32. League.

13. If a Mannor be antient demesn, or not, it shall be tryed by the Book of Doomesday, which is in the Exchequer. But whether certain Acres be parcel of such a Mannor, or no, it shall be tryed by the Country, ib. Mannor.

14. The Proceedings of a Court which is not of Record (as the County Court, the Hundred Court, the Court Baron, &c.) shall be tryed by the Country, and not by the Rolls of the Court, because they are no Record, ib. Co. Lit. 117. b. Courts not of Record.

The Priviledges and Libertis of Courts of Record, Cities and Boroughs must be tryed by their Charters and Records. By Charters and Records.

15. Whether the Ordinary committed Administration to the Plaintiff, or whether the Testament was moved before the Ordinary, or whether such a Will be the Will of the Party, or whether he died Intestate, or not: In all these Cases the Tryal shall be per Pais, because probate of Wills, and constituting Wills and Administrations.

tuting Administrators, did not belong to Ecclesiastical Judges originally, but were given to them of late. But the Tryal thereof is left to the Common Law, and was not given to them, lib. 9. 32, 40.

An Executor brings an Action of Debt, the Defendant pleads that the Testator never made him Executor, if the Plaintiff gives in Evidence the Probate of the Will, the Defendant shall only give evidence in disaffirmance of the Plaintiffs Probate, which is matter of Fact; but as to matter of Law the Court gives credit thereto, as where another Will was made, for there the Parties might have appealed; but if the Seal be counterfeit, or the Probate forged, its tryable per Jury, Adj. Pasch. 20 Car. 2. B. R. Noel and Wells. vide Wentworths Executor 69.

Criminal Matters.

The Tryal of all Criminal Matters is by the Country, and the Party accused cannot be denyed it, unless it be his own fault, as where he is mute, and will not put himself upon his Country in due time, for then without farther Tryal Judgment de pain fort & dure is passed by the Judges upon him, Stamf. Pl. Coron. 150.

Plo. Com. 267. Special Bastardy.

16. In an Action upon the Case for calling one Bastard, the Defendant justified that the Plaintiff was a Bastard; And it was awarded that this should be tryed per Pais, and not by the Ordinary, Hob. 179. Devant 6. And so a Plea that the Plaintiff was born at such a place before Marriage, this is special Bastardy, and shall be tryed per Pais. Plow. 14. Dyer 89. vide hic cap. 22.

17. When

17. When an Issue is taken, whether a Custom or no Custom in London, If the Mayor, Commonalty and Citizens be Parties, or interessed in the Action, This Custom shall be tryed by a Jury, and not by the Certificate of the Mayor and Aldermen, by the Recorder, Hob. 85. Day and Savadges Case. Devant. 3. Stiles 137. Moor 871. vide apres tit. Visne. Rolls tit. Tryal 579, 580. Customs of *London.*

The Custom of London shall be certified by the Mayor and Aldermen, by the mouth of the Recorder, Co. Lit. 74.

In an Information upon the Statute 5 Eliz. for using a Trade, to which the Defendant was not bound Apprentice, If the Defendant plead a Custom of the City, That he who is free of one Trade, may use any other; this shall be tryed by the mouth of the Recorder.

Note this difference, He that is free of one Manual Trade cannot use another Manual Trade: but it is otherwise of those Trades which are not Manual. In such, one that is free of one, may use another by the Custom.

Liberties claimed by Custom in London, the Custom of making Indentures of Apprenticeship void, if not Inrolled within a Year; The Custom to devise Lands, Foreign Attachment, &c. shall be tryed by the mouth of the Recorder. But the Issue whether there be a Market every Day of the Week in London shall be tryed per Pais, because the Issue is not upon the Custom, Rolls tit. Tryals 580. vide hic cap. 8.

Matter of Record mixt with matter of Fact.

18. A matter of Record being mixt with a matter of Fact, shall be tryed per Pais, and not by the Record, Hob. 244. Peter and Staffords Case, Devant 7.

Tryals by Battel.

19. In Writs of Right, and Appeals that touch Life, Tryal may be by Battel, or by Jury, at the Defendants choice; The Battel, in a Writ of Right, must be by Champions, (who must be Freemen,) But in an Appeal, it must be in proper Person. The Champions, in a Writ of Right are not bound to fight longer than until the Stars appear; and if the Champion of the Tenant can defend himself until then, the Tenant shall prevail: The Judges of the Court of Common Pleas, are Judges of the Battel, in a Writ of Right: and the Judges of the Kings Bench in an Appeal of Felony. It seems they seldom or never killed one another in this tryal of Battel, for their Weapons were but Batoons, and he that was banquished, was presently upon Proclamation made to acknowledge his fault in the Audience of the People, or else to cry Cravant in the name of Recreantise, &c. and upon this Judgment was to be given, and after this the Recreant should amittere liberam legem, that is, should become infamous, &c. 2 Inst. 247. Finch 421. lib. 9. 31. Mirror of Justice 161, 162. &c. 1 Inst. 294.

Writ of Right

Grand Assise.

Glanvil saith, The Tryal by Grand Assise came by the Clemency of the Prince. Est autem (saith he) Magna Assisa Regale quoddam beneficium, Clementia Principis, de consilio Procerum populis indultum.

For

For the Tryal of Treason, Murther and Felony as well upon Appeals, as upon Indictments, see Stamf. Pleas of the Crown.

By Glanvil cap. 1. lib. 14. it appeareth the Tryal of these Crimes by the old Law was this; If there were no direct Proof, nor Accuser, or if there was any Accuser, or direct Proof, yet if the Party denied the same, then the Tryal was by Wager of Battel, if the Party accused was not sixty years old, and of sound Limbs; but if he was older, or not sound, then he was to be tryed per judicium Dei, namely, per calidum ferrum vel aquam, that is, if he was a Freeholder, he was to run bare foot and bare legg'd over a row of hot Iron Bars, and if he passed three times without stop or fall, he was acquitted. And if he was a meaner Person, called Rusticus, he was to run through Vessels filled with scalding Water, 20. In a Writ of Disceit, upon a Recovery by default, the Tryal shall be, if the Judgment was given upon the Petit Cape, by the Summoners; if upon the Grand Cape, by the Summoners pernors or veiors, and not per Pais: So if a Recovery by default in a real Action be pleaded, to which the other 17. saith, Nient comprise, this shall not be tryed per Pais, but by the Summoners and Veiors, lib. 9. 32.

Per judicium Dei.

Recovery by default. Summoners pernors, veiors

Nient Comprise.

En Assise if the Issue be, whether the Land was extended in an Elegit, &c. This shall be tryed by the Extendors joyned with the Assise, 31 Ass. 6. vide Rolls tit. Tryal 581, 582.

Of Tryals per l'Eſcheator, per Examination, vide ib.

Eſcheator, Sheriff.

In an Appeal, if the Exigent be awarded, and the Party pray a Writ to inquire of the Goods and Chattels, and to ſeiſe them, this may be awarded to the Eſcheator, or Sheriff at the Election of the Court, 41 Aſſ. 13. vide hic cap. 24, 27.

Wager of Law

21. In Debt upon a ſimple Contract, Detinue, &c. The Tryal may be by Wager of Law, or per Pais, at the Defendants Election. But when the Defendant wageth his Law, he ought to bring with him Election of his Neighbours, who will avow upon their Oath, that in their Conſciences he ſaith true, ſo as he himſelf muſt be ſworn de fidelitate, and the eleven de credulitate. Ib. Finch 423. and 1 Inſt. 295. you may read excellent Learning concerning this Tryal.

Profeſſion.

22. If Profeſſion be denyed, it ſhall be tryed by the Court Chriſtian; But if the time of the Profeſſion be in Iſſue, this ſhall be tryed by the Country, lib. 4. 71. So though an Inrollment, or other matter of Record cannot be tryed per Pais, yet the time when the Inrolment was made, may be tryed per Pais. So whether the Party appeared in ſuch a Court, or on ſuch a day, &c. ſhall be tryed per Pais, Cro. 3 part 131. So whether one was Sheriff ſuch a day or not, Cro. 1 part 421. Admiſſion, Inſtitution, Plenarty and Ability of the Parſon ſhall be tryed by the Biſhop. But Induction ſhall be tryed by the Country, and ſo ſhall Avoydance by reſignation, Dyer 229.

Inrolment.

Appearance.

Sheriff.

Admiſſion, &c.

Plenarty.

Moor

Moor 61. And void, or not void shall be tryed per Pais, 1 Inst. 344. And Plenarty, if the Clerk be dead, Mirror of Justice 324. li. 6. 49. The cause of refusal of a Clerk by the Bishop, shall be tryed by the Metropolitan, if the Clerk be living; but per Pais, if he be dead, l. 5. 58.

Ability shall be tryed by the Ordinary, if the Clerk be alive, but if dead, then per Pais. Institution, Resignation, full or not full; Profession, unless alledged in a Stranger. Prior removeable at will, or perpetual, general Bastardy, the Right of Espousals, Divorce, &c. shall be tryed by the Bishops: but in many cases these matters being mixed with other circumstances, shall be tryed per Pais.

Per spiritual Law. *Vi. hic cap. 16.*

As if the Church be void by Resignation, or void or not void, Induction, Institution and Induction together, because the Common Law shall be preferred; Prior or not Prior.

Per Pais. For although Institution, Resignation, *&c.* are Spiritual, yet Avoidance, Induction, *&c.* are notorious to the Country.

Bastardy alledged in a Stranger to the Writ, or in one dead, or Abatement of the Writ. Whether a Feme be a Feme Covert in Possession, &c. in Trespass by Baron and Feme, Nient son feme shall be tryed per Pais. And see in Rolls tit. Tryal 584. &c. Many Cases where Bastardy, Marriage, &c. shall be tryed per Ley Spiritual, or per Pais. The time, &c. of Consecration of a Bishop, Bishops Certificate, *Leon.* fol. 53. *Leigh* and *Hanmers* Case.

Note, Marriage of a Wife in Possession shall be tryed *per Pais*, but not the right of Marriage, as *ne unques accouple in loyal Matrimony*; this Right must be tryed by the

and of other Spiritual Matters, shall be tryed per Pais. By what Spiritual Person the Tryal shall be, and for what cause, vide ib.

Ideot. 23. An Ideot found so from his Nativity by Office, may come in Person in the Chancery, before the Chancellor, and pray that before him, and such Justices or Sages of the Law, which he shall call to him (who are called the Council of the King) he may be examined whether he be an Ideot or no; or by his Friends he may sue a Writ out of Chancery, returnable there, to bring him into the Chancery, ibid. coram nobis, & concilio nostro examinand. lib. 9. 31.

Sheriff. 24. If it be in question, whether the Sheriff made such a return or not, It shall be tryed by the Sheriff: If whether the Under-sheriff made such a Return or not, it shall be tryed by the Under-sheriff; If the question be, whether such a one be Sheriff or not, he is made by Letters Patents of Record, and therefore it shall be tryed by the Record, ib. Cro. 1 part 421.

Retorn.

Dures. 25. If an Approver say, that he commenced his Appeal before the Coroner per dures, this shall be tryed by the Record of the Coroner; and if it be found that he did it without dures, he shall be hanged, ib. Corone br. 75.

Statute. 26. The Tryal, whether a Statute shewed before, be the true Statute or not, shall be by the examination of the Mayor and Clerk of the Statutes, which took the Statute, and not per Pais, ib. Whether a Statute hath two Seals or not, shall be tryed per Pais, Leon. 228, 229.

27. In

27. In Aſſiſe the Tenant ſaid, that the Lands were taken into the Kings Hands, this ſhall be tryed by the Examination of the Eſcheator. Eſcheator.

28. If one in avoidance of an Outlawry, alledge that he was in Priſon at Burdeaux, ultra mare in ſervitio Majoris de Burdeaux, this ſhall be tryed by the Mayors Certificate; and in ſuch like Caſes, other Tryals ſhall be by the Certificate of the Marſhal of the Hoſt, and by the Captain of Calice, and alſo by Meſſenger, of a thing done beyond Sea, ib. Certificate. Meſſenger.

29. At the Petit Cape, the Tenant ſaid that he was impriſoned three days before the default, and three days after, this ſhall be tryed by the Examination of the Attorny; Nient Attach. per 15 Jours in Aſſize ſhall not be tryed per Pais, but by Examination of the Baily, ib. Petit Cape. Baily.

30. It ſeems an Almanack is ſo infallible, that it hath countervailed the Verdict of a Jury. For in Error of a Judgment given in Lynne, the Error aſſigned was, That the Judgment was given at a Court held there on the 16th day of February, 26 Eliz. and that this day was Sunday, and it was ſo found by Examination of the Almanacks of that year: upon which it was ruled, that this Examination was a ſufficient Tryal, and that a Tryal per Pais was not neceſſary, although it were an Error in Fact; and ſo the Judgment was reverſed, Cro. 3 part, fol. 227. 1 Leon. 242. the ſame Caſe, and there it was ſaid, it was twice ſo ruled before. Almanack.

Ordeal.

31. In ancient times there was a Tryal in Criminal Causes called Ordalium, for upon Not Guilty pleaded, the Defendant might put himself upon God and the Country (as is the ule at this day) or else upon God only; and then if he was a Freeman, he was to be tryed per ignem, that is, he was to pass over Novem vomeres ignitos nudis pedibus, and if he was not hurt by this, then he was to be acquitted, otherwise condemned; and this was called Judicium Dei; But if he was a Slave, then his Tryal was to be per aquam, and that divers ways, which all appear in Lambard, verbo Ordalium. From which kind of Tryal I presume we still retain this Expression of an innocent Person, That he need not fear fire or water: this manner of Tryal was first prohibited by the Canons, then by Parliament:

Battel.

The Tryal by Battel is likewise prohibited by the Canons, but not by Parliament, as you may read in the ninth Report, fol. 32. and in the Authorities there cited, which I therefore omit to recite here, (though I have the Books by me) and so in this whole Treatise, where I refer you to a Book, I shall not set down the Authorities cited in that Book, which will avoid prolixity.

Which Tryal shall be first.

32. When the matter alledged extendeth to a Place at the Common Law, and a Place within a Franchise, it shall be tryed at the Common Law, 1 Inst. 125. 4 Inst. 221.

Tryal in one Issue binds in another.

In what Cases a Tryal in one Issue shall bind the same Party in another Issue, upon the same matter.

In

In Debt against two per ſeveral Præcipes, if one plead a releaſe, and they are at iſſue upon the Deed, and the other plead the ſame Iſſue, if it be found the Deed of the Plaintiff in the former Iſſue, this ſhall bind him in the ſecond Iſſue, 12 H. 4. 8.

In Treſpaſs if the Defendant plead Villenage in the Plaintiff, if this be found againſt the Defendant, this ſhall bind him in the ſame Iſſue, in another Action in the ſame Court betwixt the ſame Parties, 44 Aſſ. 5.

If a Man be found guilty of a Conſpiracy upon an Indictment at the Kings Suit, this ſhall not bind in a Writ of Conſpiracy at the Suit of the Party, but he may plead not guilty, 27 Aſſ. 13.

If a Man upon an Indictment of Extortion confeſs it, and put himſelf in the Kings Grace and makes Fine, &c. this ſhall bind him, and he ſhall not plead not guilty to the Suit of the Party, for a Confeſſion is ſtronger than a Verdict, 27 Aſſ. 57. per Sharde, vide Rolls tit. Tryal 625.

In what Caſes tryal againſt one ſhall be againſt others.

He which is not Party to the Iſſue nor can have attaint, or challenge the Inqueſt, ſhall not be bound by the Tryal, 11 H. 4. 30.

And therefore in Treſpaſs againſt two, and one pleads a Releaſe, and the other juſtifies as his Servant: If the Iſſue be found againſt the Maſter, it ſhall not conclude the Servant, 11 H. 4. 30. Rolls ib. 625.

At what time the Tryal ſhall be.

One ſhall not be compelled to try a Traverſe the ſame Seſſions he makes it, for a Man ſhall have time to make his defence, and is not ſuppoſed to be ready to anſwer ſudden Objections, and for this reaſon many Judg-

Judgments upon Indictments have been reversed.

Justices of Oyer and Terminer, nor Justices of Peace cannot inquire and determine the same day. But Justices of Gaol Delivery, and Justices in Eyre may.

Justices of Peace cannot proceed to the delivery of a Person indicted of Felony before them the same day he is arraigned, 22 E. 4. Coron. 44. Declared by all the Justices of England, to be observed as a Law.

In an Indictment in B. R. or in the same County and removed thither, the Defendant may be arraigned and tryed the same day. For the Kings Bench is a Court of Eyre for all Offences in that County. Otherwise of an Indictment removed out of another County, Vide Rolls tit. Tryal 626. many Cases de ceo.

Marshal Affairs.

33. All Matters done out of the Realm of England, concerning War, Combat or Deeds of Arms, shall be tryed and determined before the Constable and Marshal of England, before whom the Tryal is by Witnesses, or by Combat, and their proceeding is according to the Civil Law, and not by the Oath of twelve Men, 1 Inst. 74. 261. Wherefore if the Kings Subject be killed by another of his Subjects in any Foreign Country, the Wife or Heir of the Dead, may have an Appeal before the Constable and Marshal, who sentence upon the testimony of Witnesses or Combat, ib. So if a Man be wounded in France, and die thereof in England, ib. 4 Inst. 140.

Witnesses or Combat.

It

It is worthy our observation, to take notice when there are several Issues, which of them shall be first tryed; And for this you have already heard, that where Issue is joyned for part, and a Demurrer for the residue, the Court may direct the Tryal of the Issue, or judge the Demurrer first, at their pleasure, though by the Opinion of Dodrige, It is the best way to give Judgment upon the Demurrer first, because when the Issue comes afterwards to be tryed, the Jury may assess Damages for the whole.

What Issue shall be first tryed.

Latch. 4.

Damages.

A Scire facias was brought on a Recognisance in Chancery, the Terre-tenants pleaded several Pleas, the Plaintiff demurred to one, and took Issue on the other, the Record was sent into B. R. to try the Issue, and it was tryed, and Verdict pro Plaintiff, the Demurrer not being argued, and it was adjudged per B. R. that Judgment ought to be given on both by that Court, Jeffreyson and Dawsons Case, Hill. 21. 22 Car. 2. B. R. vide for these things, 1 Roll Abr. 534, 535. Rolls Rep. 287. and in the principal Case, 4 Inst. 80. was denied to be Law.

An Immaterial Issue joyned, which will not bring the matter in question to be tryed, is not helped after Verdict by the Statute of Jeofails, but there must be a Repleader; because this is matter of substance, for if there were no Issue, there could be no Verdict, and so it is as if nothing had been done in the Cause.

Immaterial Issue.

In an Action against two, the one pleads in abatement of the Writ, the other to the Action; the Plea to the Writ shall be first tryed,

Plea to the Writ.

tryed, for if that be found, all the whole Writ shall abate, and make an end of the Business; for the Plaintiff ought not to recover upon a false Writ, 1 Inst. 125.

Plea to the whole first tryed.

In a Plea personal against divers Defendants, the one Defendant pleads in Bar to parcel, or which extendeth only to him that pleadeth it: And the other pleads a Plea which goeth to the whole: the Plea that goeth to the whole, (that is) to both Defendants shall be first tryed, because the other Defendant shall have advantage thereof; For in a personal Action the discharge of one is the discharge of both.

Release:

Rolls tit. Tryal 628.

As for example, If one of the Defendants in Trespass pleads a Release to himself (which in Law extends to both) and the other pleads not guilty (which extends but to himself;) or if one pleads a Plea which excuseth himself only, and the other pleads another Plea which goeth to the whole, the Plea which goeth to the whole shall be first tryed; for if that be found, it maketh an end of all: And the other Defendant shall take advantage hereof, because the discharge of one is the discharge of both. But in a Plea real it is otherwise, for every Tenant may lose his part of the Land; as if a Præcipe be brought as Heir to his Father against two, and one pleads a Plea which extendeth but to himself, and the other pleads a Plea which extends to both, as Bastardy in the Demandant, and it is found for him, yet the other Issue shall be tryed; for he shall not take advantage of the Plea of the other, because one

Discharge of one dischargeth both.

Joyn-

Joyntenant may loſe his part by his miſplea.

Brown and Stamford Juſtices conſulted with Grammarians in things of Grammar; and Hulls a Batchelor of Law (tempore H.6.) was called into Court to ſhew the difference between preciſe and cauſative Compulſion, Vide Plow. 122, 127, 128.

Paſch. 16 Car.2. B.R. An Action of Trover, &c. was brought de ſex Capitalibus fibulatis, Anglice ſix laced Coifs; after Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Latin Words were both Adjective, and ſo not certain; but it was anſwered, that Capaital is a Subſtantive, and the Nomenclator of Weſtminſter School was produced to warrant it, and it was adjudged for the Plaintiff accordingly, and the Court allowed that authority before Riders Dictionary.

CAP.

CAP. III.

Of a *Venire Facias*; to whom it ſhall be directed; when to the Sheriff, when to the Coroners, when to Eſſiors, and when to Bayliffs; when well awarded, *&c.*

HAving given you the Epitome of what Tryals are allowed by the Common Law, and what ſhall be tryed per pais, and what not; we ſhall now apply our ſelves more particularly to the Tryal by Juries: And becauſe a Venire facias is the foundation and Cauſa ſine qua non, of a Jury (I mean in Civil Cauſes; for in Criminals, as upon Indictments, the Juſtices of Gaol-Delivery, give a general Command to the Sheriff, to cauſe the Country to come againſt their coming, and take the Pannels of the Sheriff, without any Proceſs directed to him; yet Proceſs may be made againſt the Jury, though it is not much uſed. Stamford Plees del Corone 155.) I will firſt recite the Writ in terminis, the rather, becauſe I intend to order my Diſcourſe, according to the method of the Writ.

Venire facias. Rex, &c. Vic: W. Salutem. Præcipimus tibi quod venire facias coram Juſticiariis noſtris de Banco apud Weſtm. tali die, duodecim liberos & legales homines de vicinet. de C. quorum

quorum quilibet habeat quatuor libras terræ, tenement. vel reddit. per annum ad minus, per quos rei veritas melius ſciri poterit; Et qui nec D. C. nec F. G. aliqua affinitate attingunt; ad faciend. quandam Jur. patriæ inter partes prædict. de placito, &c. quia tam idem D. quam prædict. F. inter quos inde contentio eſt, poſuer. ſe in Jur. illam. Et habeas ibi nomina Jur. illorum & hoc breve. T. &c.

This is one of thoſe Latine Letters, (as Finch terms them, f. 237.) which the King ſends with ſalutation to the Sheriff; but withal commands him, that he cauſe to come twelve free and lawful Men of his County, to reſolve the Queſtion of the Fact, in diſpute between the Parties upon the iſſue; and it is a Judicial Writ, iſſuing out of the Record, for Plaintiff or Defendant, after they have put themſelves upon the Country: for upon the Words Et de hoc ponit ſe ſuper patriam, by the Defendant, or, Et hoc petit quod inquiratur per patriam, by the Plaintiff, and iſſue joyned thereupon, the Court awardeth the Venire facias, vid. Ideo fiat inde Jurat.

Ideo venit inde Jurat. is Error in inferiour Courts, for it ought to be Ideo precept. eſt vic. quod ven. fac. &c. Siderfin 364. and it ſhould be de viſneto de D. ſpecially, Keeble 2 part. 350.

And if they come not at the day of the Writ returned, then ſhall go forth againſt them, an Habeas Corpora and Diſtringas, to bring them in to try the matter. The which

which two last Writs are usually made with this Clause, Nisi prius Justiciarii venerint, &c. and are returnable after the time of the Judges coming their Circuit.

Sheriff. And first, you see it is directed Vicecomiti, i. e. to one who is Vicecomes, and hath the Regimen of the County instead of the Earl of that County, to whom once it did belong: as we are taught in the Mirror, cap. 1. sect. 3. scil. That it appeareth by the Ordinance of ancient Kings before the Conquest, That the Earls of the Counties had the Custody or Guard of the Counties. And when the Earls left their Custody or Guards, then was the Custody of Counties committed to Viscounts, who therefore are called Vicecomites.

What trust in the Sheriff. What great Repose and Trust both the King and Laws put in this great Officer, the Oracle tells you, 1 Inst. 168. That he is Sheriff, that is, Præfectus Comitatus, Governour of the County; for the Words of his Patent be, Commisimus vobis Custodiam Comitatus nostri de, &c. And he hath a threefold Custody, triplicem Custodiam, viz. first, Vitæ Justiciæ, for no Suit begins, and no Process is served but by the Sheriff. And he is to return indifferent Juries for the Tryal of Mens Lives, Liberties, Lands, Goods, &c. Secondly, Vitæ Legis, he is after long Suits and chargable to make Execution, which is the Life and Soul of the Law. Thirdly, Vitæ Reipublicæ, he is Principalis Conservator pacis within the County, which is the Life of the Commonwealth, for Vita Reipublicæ Pax.

Yet

39. Yet notwithstanding the height and Latitude of this great Officers Power and Trust, the Law adjudges him in many cases not capable to do so much as return a Jury; for if he be of Kindred by nature, or of affinity by Marriage to any of the Parties, or (that I may say all in a little) if he be not as indifferent almost in all respects as he is whom the Law allows to be a Juror, he ought not to meddle with the returning of the Jury. But the Venire facias shall be directed to the Coroners (or to some of them, if the residue are not indifferent) who in that case are hac vice, Vicecom. And if the Coroners are not indifferent, then the Venire shall be directed Ad 2 Electores, that is, to two whom the Court shall chuse and deem fit to return the Jury; and to the return of these Elisors or Esliſors, ab Eligendo, no challenge will be admitted. Bro. tit. Venire facias 14. as to the Array, but to the Polles, 1 Inſt. 158. If one of the Sheriffs of London be a Party, then the Venire may be directed to the other Sheriff; if the Under-Sheriff be a Party, yet the Venire may be directed to the Sheriff, with this Proviſo, Quod Sub-Vic. tuus in nullo ſe intromittat cum executione iſtius brevis. 18 E. 4. 3.

To whom the *Venire facias* ought to be directed.

Coroners.

Forteſcue, cap. 2. 5.

Elliors.

Challenge.

Sheriff of *London.*

Of *London* or of any place, where two perſons make one Sheriff.

Judicial Writs (ſay Cook and Sanders Plo. 74.) may be directed to the Coroners, as the Venire facias, where the parties are at iſſue; there, upon the ſurmiſe of the Plaintiff, that the Sheriff is his Couſin, and upon prayer that the Venire be directed to the Coroners, for avoydance of his own delay that might happen by the challenge of the Array,

Suggeſtion.

Of whom.

Coroners.

So in Ejectment against four upon Affinity of the Sheriff to one of the Defendants. Rolls tit. Tryal 668.

Examination.

Not of the Defendants Suggestion.

The Defendant may not have a *Venire facias* to the Coroners.

the Defendant shall be examined whether it be be true, or not, and if he confess it, then the Venire shall be awarded to the Coroners; for then it appears to the Court by the Defendants confession, that the Sheriff is not indifferent; but if the Defendant denies it, then the Process shall be awarded to the Sheriff, because the Sheriffs Authority and Profit shall not be taken away, without cause apparent to the Court; but if the Defendants will alledge any such matter, and pray a Venire facias to the Coroners, there the Plaintiff shall not be examined, neither shall such Allegations be allowed, because delays are for the Defendants advantage, and the Defendant may challenge the Jury for this cause, and so is at no prejudice.

And see in Term. Hill. 3. H. 7. f. 5. placit. ult. In a Quare Impedit, where the Defendant shewed how the Sheriff was Cousin to the Plaintiff, and prayed a Writ to the Coroners, but it was denied him upon the same reason. Fitz. tit. suggestion placit. 8. Br. Challenge 153.

In the Lord Brook's Case, Trin. 1657. B. R. In Ejectment, the Court was moved, that Lord Brooks might be made Ejector, which was granted; then the Court was informed that the Lessor of the Plaintiff was High Sheriff of the County, and that the Coroner was Under-Sheriff, and it was prayed that Elizors might return the Jury; but the Court would not grant it at the prayer of the Defendant, though the Plaintiff offered to agree to it, it being in a Tryal by Nisi prius: but had it been in a Tryal at Bar,

War, they would have granted it. But the regular course is for the Plaintiff to pray it, or else the Defendant may challenge the Array at the Assises; for it is a principal challenge, that the Lessor of the Plaintiff is High-Sheriff, or of Kindred to the Sheriff, 41. for which see Hutt. 25. More 470. Rolls Rep. 328. And it was so adjudged, Trin. 15 Car. 2. B. R. Duncomb and Ingleby, that it is a principal challenge.

For what causes Process shall be directed to the Coroners.

In Ejectment, the Plaintiff suggested that he and one of the Coroners were all of the liberty del Countee Wigorn', and prayed a Venire facias to the other Coroner; although this is no principal challenge, and the Defendant might have opposed the prayer, yet because he confessed it, the Award was well to the Coroner. So if the cause be that one of the Coroners be retained of Counsel with the Plaintiff. If the suggestion do not comprehend a principal challenge, but only of favour, this is not sufficient to award Process to the Coroners; but if it be a principal challenge, as Affinity, &c. If the Defendant confess it, the award shall be to the Coroners; if he will not confess it, then to the Sheriff, and in such case the Defendant shall never challenge the Array for that cause: so if the Plaintiff pray process to the Coroners for favour in the Sheriff, if the Defendant say that this is not favourable, he shall never challenge for favour unless de pulne temps.

If the Array be quashed because made by the Sheriffs Minister, who was aiding and of Council with one of the Parties, yet the Writ shall not be directed to the Coroners,

but to the Sheriff, commanding him to make the Pannel by another Officer. As, Ita quod the Sheriff ne se intromittat, &c.

Note, The Sheriff may appoint a general Officer in a Court, and his return shall be good. Keeble 1st Part. 357.

If the Tales be quashed for affinity in the Sheriff, but not the principal Pannel, because 'twas made before the affinity, yet all shall be awarded to the Coroners, Scil. the Distringas of the principal Pannel, and that they return a new Tales, for there shall be but one Officer if the Array be quashed, because made but by one of the Coroners, or for affinity in one, &c. Yet the Process shall still go to the Coroners, Ita quod the Coroner se non intromittat.

To whom Process shall be directed for default in the Sheriff and Coroners.

If default be in the Sheriff and Coroners, the Court may choose two Esliors, and if the Parties can say nothing against them, they shall make the Pannel.

But the Distringas shall not be directed to Esliers, for the Court cannot make Officers to distrain the Kings Liege People, but the King may. 8 H. 6. 12. dubitatur.

Process may be directed to the Justices of Assise, by assent of Parties, not without.

When a Pannel is made by the Esliors, they shall afterwards serve all Process that comes upon this, as the Sheriff should. 15 E. 4. 24. 18 E. 4. 3, 8. Rolls tit. Tryal 670. For it may be the Sheriff will distrain only those who are his Friends and be partial.

When the Process is once awarded to the Coroners, for a default in the Sheriff, if there be a new Sheriff made afterwards, who is in-

indifferent, yet the Proces shall not revert but continue to the Coroners pendant le plea. 14 H. 7. 31. Bro. tit. Venire facias 17. So the Entry is, Ita quod Vicecomes se non intromittat. 18 E. 4. 3. 8 H. 6. 12.

Venire facias once directed to the Coroners shall not be to the Sheriff afterwards.

And therefore where the Sheriff ought not to return the Venire, he cannot return the Tales. For in Error in the Exchequer Chamber of a Judgment in the Queens Bench, the Error assigned was, because the Venire facias was awarded to the Coroners, for consanguinity in the Sheriff; and it was returned by the Coroner, and afterwards the Tales was awarded, and it was returned by the Sheriff, and it was tryed, and a Verdict given, and Judgment. And for this cause held to be Erroneous, and not aided by the Statute of 32 H. 8. or 18 Eliz. Wherefore the Judgment was Reversed. Cro. 3. par. 574. Bro. tit. Octo Tales 9.

Sheriff shall not return the *Tales*, where he cannot the *Venire facias*.

I will instance one Case more in the same Reports, f. 586. because it is very full in the point. After issue in Trespass, the Plaintiff for his expedition surmised, that he was Servant to the Sheriff, which being confessed by the Defendant, the Proces was awarded to the Coroners, and after Verdict, it was moved in Arrest of Judgment, that the Tales de circumstantibus was awarded, and returned by the Sheriff which was held by the whole Court to be good cause for staying the Judgment; for it is a mis-tryal, not aided by any of the Statutes, for Proces being once awarded to the Coroners, the Sheriff afterwards is not the Officer to return the Jury, no more than any other Man, and Proces

Where the Coroner returns the *Venire facias*, he ought to return the *Tales*.

ought always to be returned by him, who is an Officer by Law to return it, otherwise it is meerly void. But afterwards upon view of the Record, it appeared that the Tales was returned by the Coroners, and their Names annexed thereto, wherefore it was without further question. But the Court said, if their Names had not been annexed to the Tales, yet it had been well enough; for they be annexed to the first Pannel, and it shall be intended that the right Officer return'd it; and the usual course is, That to such Tales there is not any Officers Name subscribed, and yet it is good enough; for it is not within the Statute of York, which appoints that the Name of the Sheriff should be subscribed; but it was moved that the Record of the Postea is, That the Tales were returned by the Sheriff; but the Court held, that it was amendable, and it was done accordingly, and the Plaintiff had Judgment.

No name to the Return.

But if the Venire be awarded to the Coroners, for default in the Sheriff, and they do nothing upon the Writ, then I suppose, upon a default discovered in the Coroners, de puisne temps, the Party may shew this to the Court, and have a Venire awarded to the Sheriff, (if there be an indifferent one made in the mean time) or else to Esliors, & sic e converso.

Venire facias to the Sheriff, after one awarded to the Coroners.

In Error of a Judgment in Chester, the Parties being at issue, a Venire was awarded to the Sheriff, and at the day of the Return, it was entred Quod Vicecomes non misit breve. And then the Plaintiff prayed a Venire facias to the Coroners, for coznage betwixt him

Venire facias to the Coroners, after one to the Sheriff.

him and the Sheriff, which was awarded accordingly; and at the day of Tryal the Defendant made default, and there upon Judgment Error was assigned, because that after the Plaintiff had admitted the Sheriff to execute the Writ, he could not pray a Venire facias to the Coroners, without some cause de puisne Temps; sed non allocatur, because there was nothing done upon the first Writ. And the Defendant having made default, it was not material. Cro. 3. part. 853.

No *Venire facias* to the Coroners, after one to the Sheriff.

But the Defendant might have demurred to this prayer; for if the Plaintiff pray a Venire facias to the Sheriff, he shall not challenge the Array, nor have a Venire afterwards to the Coroners, because the Sheriff is his Cousin, or for any other principal challenge, whereof he might by common intendment have conusance, when he so prayed the Venire facias; for upon shewing this cause at first, he might have prayed Proces to the Coroners; but for a principal challenge, of which by common intendment the Plaintiff could not know at the first, as that the Defendant is of kindred to the Sheriff, &c. he may afterwards challenge the Array, when they appear, or if the Sheriff doth nothing upon the Writ, he may pray a new Venire to the Coroners. 15 H. 7. 9.

If the Defendant denies the Plaintiffs suggestion, he shall have no benefit of it by Challenge.

If the Plaintiff prays a Venire facias to the Coroner, because he is of kindred to the Sheriff, if the Defendant will not confess this, but denies it, this shall be entred, and the Defendant shall not challenge the Array for this cause afterwards. Br. tit. Venire facias 21. and 23.

By consent, the *Venire facias* may be directed to a wrong Officer.

If a Venire facias be awarded to the Coroners where it ought to be to the Sheriff, or the Visne cometh out of a wrong place, yet if it be per assensum partium, and so entred of Record, it shall stand, for omnis consensus tollit errorem. 1 Inst. 126. li. 5. 36.

Mistrial without such consent.

But if it be directed to the Coroners, where it ought to be to the Sheriff, without such consent of parties; This is an insufficient Tryal, not remedied by any Statute, except it be upon an insufficient suggestion, and then the Statute of 21 Jac. c. 13. helps it.

Venire facias to some of the Coroners.

Upon suggestion that the Plaintiff and the Sheriff, and one of the Coroners are of kindred to the Plaintiff or Defendant, or upon any other suggestion which contains a principal challenge, the Venire facias may be directed to the other Coroners. Dyer 367.

Bayliffs.

Error of a Judgment in Northampton, because in Northampton the Court being held before the Mayor and two Bayliffs, the Venire facias upon the Issue was awarded to the two Bayliffs to return a Jury, before the Mayor and Bayliffs, secundum consuetudinem: which being returned and Judgment given, the Error assigned was, because the Bayliffs being Judges of the Court, could not also be Officers to whom Process should be directed, there being no custom that can maintain any to be both Officer and Judge. But all the Court (absente Hyde) conceived it might be good by custom, and that it is not any Error, for the Judges be not the Bayliffs only, but the Mayor and Bayliffs; and it is a common course in many of the ancient Corporations, where the Bayliffs are Judges, or the Mayor and

Judge and Officer to return Writs.

and they be Judges; yet in respect of executing Process, they be Officers also; and one may be Judge and Officer diversis respectibus, as in Rediſſeiſin, the Sheriff is Judge and Officer: Whereupon Judgment was affirmed. Cro. 1. part. 138.

In Treſpals and Aſſault laid in the Court, to be at the Palace of Weſtminſter; It was adjudged, that the Venire facias ſhall iſſue al Garden del Palace, and not to the Sheriff of Middleſex. Bro. tit. Ven. fac. 31.

Venire facias to the Garden of the Palace of *weſtminſter.* Rolls tit. Tryal 667.

In Treſpals againſt two, if one plead, and two iſſues are joyned upon his Plea, and two other iſſues are alſo joyned, and the Court award a Venire ad triandum exitum illum quam prædictum alium exitum inter the Plaintiff and the other Defendant, &c. This is a good award, although there be ſeveral iſſues betwixt the Plaintiff and both Defendants, becauſe that this word Exitus may be for all reddendo ſingula ſingulis. Hob. 91.

Award of *Venire facias.*

If an Inqueſt remain for default of Rapers, and a Decem Tales is awarded, and the Defendant ſaith for his deliverance that he is Lord of the Rape, where, &c. and that all there are within his Diſtreſs, and prays a Writ to the next Hundred; the Court may try this by Tryors preſently, without a return of the Sheriff, and if it be true may award to the next Hundred, otherwiſe if it be falſe. 3 H. 6. 39.

Prochein Hundred.

CAP.

CAP. IV.

What faults in the *Venire facias* ſhall vitiate the Tryal, what not. When a *Venire facias de novo*, ſhall be awarded; when ſeveral *Venire facias*'s. When the *Venire facias* ſhall be betwixt the Party and a Stranger to the Iſſue; Who may have a *Venire facias* by *Proviſo*, and when.

WE have now ſhewed you to what Officer the Venire facias ſhall be directed; The next ſtep in the Writ is Præcipimus tibi quod Venire facias: which words Venire facias, are the moſt effectual words in the Writ, and therefore they give the denomination to the whole Writ: And here opportunity is offered us to ſpeak ſomething of a Venire facias in general. I am not ignorant how our Books ſwarm with Caſes which ariſe from the defects in this Proceſs, and how that Verdicts have been ſet aſide, Judgments ſtayed and reverſed, for want of ſufficient Returns, miſawarding, diſagreement with the Rolls, diſcontinuance, and many other faults in this Writ. But the Statutes of Jeofailes (eſpecially the Statute 21 Jac. cap. 13.) have pardoned (as I may ſo ſay) theſe enormities; As, The awarding this Writ, Hab. Corpora, or Diſtringas to a wrong

Venire facias, why the Writ ſo called.

Statute of *Jeofailes* 21 *Jac.* 13.

wrong Officer, upon any insufficient suggestion, or by reason the Visne is in some part misawarded, or sued out of more places or fewer places than it ought to be, so as some place be right named: The misnaming of any of the Jury, either in Sir-name or addition in any of the said Writs, or in any Return thereupon, so that upon examination it be proved to be the same Man that was meant to be returned; or if no Return be upon any of the said Writs, so as a Pannel of the Names of the Jurors be returned, or annexed to the said Writ; or if the Sheriff or Officers Name, having the Return thereof, is not set to the Return of any such Writ, so as upon examination it be proved that the said Writ was returned by the Sheriff or Under-Sheriff, or such other Officer. **In all these Cases the Judgment shall not be stayed, nor reversed for these defects.**

But this Act doth not extend to any Writ, Declaration, or Suit of Appeal of Felony, or Murther, nor to any Indictment or Presentment of Felony or Murther, or Treason; nor to any Process upon any of them; nor to any Writ, Bill, Action, or Information upon any popular or penal Statute; wherefore since Informations and popular Actions are grown so frequent, the Attornies, &c. herein had best beware of these Jeofailes.

By this Statute many defects are remedied, which were not by the Statutes of 32 H. 8. cap. 30. and 18 Eliz. cap. 14. yet all are not; for this Act only helps the misnaming of a Juror in Sir-name, or addition, and saith nothing of his Christian name: where- Popular Action, *&c.*

Christian name mistaken in the *Venire facias*, incurable.

wherefore I conceive the Law in Codwel's Case in the fifth Report, remains as it was then; which is, that if a Juror be mis-named in his Christian name, on the Venire, though he be named right in the Distringas and Postea, yet this is ill, and not amendable, and with this agrees Goddard's Case, Cro. 2. part 458.

Christian name right in the *Venire facias*, and wrong in the *Distringas*.

And since the Court (Cro. 1 part. f. 203.) doubted thereof, I may well put the Question; If a Juror be right named upon the Venire, and mis-named in his Christian Name in the Distringas, &c. whether this is amendable or not; without dispute it is not by the Statute of 21 Jac. for that only helps the Sir-Name. But with reverence to the Courts doubt, I conceive clearly, it is holpen by the Statutes of 32 H. 8. and 18 Eliz. as a discontinuance of Process; and I may with the more confidence believe it, because in Codwel's Case aforesaid, where in the Pannel of the Venire, a Juror was named Palus Cheale, and in the Distringas, &c. he was right named Paulus Cheale, and so because he was mis-named in his Christian Name in the Venire, Judgment was arrested. But it is there adjudged, that if he had been well named upon the Venire, and mis-named on the Distringas or Postea, then upon examination it should be amended. But the Countess of Rutlands Case, Lib. 5. 42. is express in the Point, and so is Cro. 3. part. 860. Rolls 196. Teppet in the Venire and Tipper in the Distringas, amended. And so if the mistake be in the Pannel Jurata, the Sheriff may come in Court, and amend it. And so if

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if Samuel be in the Venire and Diſtringas, and Daniel in the Nomina Juratorum, upon examination, this may be amended. And ſo if the Name be right in the Venire, and miſtaken in the Chriſtian Name in the Diſtringas or Poſtea, it is amendable. Rolls 197. And ſo if he be De A. in the Venire and Diſtringas, and De B. in the Nomina Juratorum, this is amendable.

And it is to be known, that in moſt Caſes, where the Venire facias, Habeas Corpora, or Diſtringas be defective, they are to be amended; but if the malady be ſo fatal in the Venire, that it cauſes a miſtryal, (as in the miſtake of a Jurors Chriſtian Name, or where a Juror not returned is ſworn, &c.) then the Verdict is to be ſet aſide, and a Venire facis de novo, to be awarded; and ſo was it to be upon thoſe miſtakes, (now amendable by the Statutes) before the making thereof. And where a Jury giveth a Verdict which is accepted and Recorded by the Court, be the Verdict perfect or imperfect, the Jurors are diſcharged, and ſhall never try the ſame iſſue again upon a new Niſi prius. But if the Verdict be ſo imperfect that Judgment cannot be given upon it, then the Court ſhall award a Venire facias de novo, to try the iſſue by other Jurors. Lib. 8. 65. Bulſtr. 2 part 32.

Venire facias de novo.

One Jury ſhall not try a Cauſe twice.

If upon an iſſue all the matter be not fully enquired, a Venire facias de novo ſhall iſſue. 18. E. 3. 50.

Venire facias de novo.

In an Audita Querela, if the Parties go to iſſue upon payment according to the defeazance of the Statute, and this is found for the

the Plaintiff, but the Jury do not assess Damages, the Court shall award a Venire facias de novo, to assess Damages. 22 E. 3. 5. vide hic cap. 6. and Rolls tit. Tryal 593, 595.

If the Record of the Nisi prius be unum modum tritici for modium, and the Plaintiff is Nonsuit at the Assise, for this mistake, if the Record in Court be right, scil. Modium, this Nonsuit shall not be Recorded, but a Venire facias de novo shall be awarded. So for any other mistake, as if the Record in Court be Grays-Inn Lane, &c. and the Nisi prius, which is but a Transcript, be Graves-Inn Lane, &c. For this is a Nonsuit upon another Record than what is in Court.

In Battery against Three who plead Three several Pleas, and upon the Writ of Nisi prius, two issues are found for the Plaintiff, and Damages assessed; but nothing is found for the third issue, this is a mis-tryal, and a Venire facias de novo shall issue.

Detinue. In Detinue, if the Jury find Damages and Costs, but no value, as they ought, this shall not be supplied by a Writ of Inquiry of Damages, but a Venire facias de novo shall be granted. And so of other defects in finding the full issue.

Quare impedit. In a Quare impedit if the issue be found for the Plaintiff, but by negligence, the Jury do not inquire of the four points, scil. de plenitudine, ex cujus præsentatione, si tempus semestre transierit, and the value of the Church per annum; This shall be supplied by a Writ

Writ of Inquiry, without a Venire facias de novo, because the Court ex officio ought to have charged the Jury with the four points of Inquiry, and if the Jury had found them, no Attaint lay; for as to this they were but as an Inquest of Office.

In a Writ of Annuity, if the issue be found for the Plaintiff, but the Jury do not assess Damages or Costs, this shall not be supplied by a Writ of Inquiry, but a Venire facias de novo shall be granted. Annuity.

In Ejectment against Baron and Feme, and the Jury find the Wife not guilty, and find a special Verdict as to the Husband, which special Verdict is afterwards adjudged insufficient by the Court, a Venire facias de novo shall be granted for both, as well the Wife as the Husband, and the Wife may be found guilty, because the Record and Issue is intire, and the Verdict is insufficient and void in tout. Ejectment.

So if there be several issues, and the Jury find some well and directly, and in others special Verdicts which are imperfect, a Venire facias de novo shall be granted for all, and the Jury may find contrary to their first finding. Imperfect Verdict.

In Trespass of Assault and Battery, and taking away of grain, and the Defendant as to the Battery justifies in defence of his grain, upon which the Plaintiff demurs, and as to the grain he pleads not guilty, which is found for the Plaintiff, and the Jury do not tax Damages for the Battery depending in Demurrer as they ought, in this Case, if the Demurrer be afterwards adjudged for the Plaintiff,

Plaintiff, yet the Damages for this cannot be afterwards supplied and taxed by a Writ of Inquiry of Damages, but a Venire facias de novo shall issue to Tryal, because all is comprised in one Original. Vide apres cap. 13. and devant cap. 2.

Who shall grant it?

In a Scire facias upon a Recognisance in Chancery, if the Parties be at issue, upon which the Record is commanded into B. R. and there it appears that the Venire facias is not well awarded, the Venire facias de novo shall be awarded in the Kings Bench, and not in the Chancery. Rolls tit. Tryal 723.

Album Breve, the County left out in a *Venire facias.*

In Yelverton's Reports, f. 64. The Case is, that a Venire facias was made Vicecomiti, leaving out Salop, for which there was a blank left in the Writ. But re vera, it was returned by the Sheriff of Salop. In Arrest of Judgment, it was alledged that the Venire facias was vitious for this cause; but Gawdy said it should be amended; and by Fenner and Williams, it is as no Writ, because it is not directed to any Officer. And then it is aided by the Statute of Jeofailes; for it might rather be called a Blank than a Writ, because it was directed to no Officer. If there be no return of the Sheriff indorsed upon the Venire facias, it was held not amendable. 35 Eliz. Lib. 5. 4. Otherwise of the Distringas, if that be Album breve, and no return, if the Venire facias be right. Rolls tit. 204.

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In Cases where there are several Defendants, who plead several Pleas, the Plaintiff may chuse either to have one Venire facias for all, or several, for every one of the Defendants; but (if you will be ruled by Stamford) the surest way is to have a Venire facias against every one, and then one cannot have benefit of the others challeng; neither shall the death of one abate the Venire facias against the other; (this he speaks of in Appeals) but if the Court once award a joynt Venire facias, you cannot have several Venires afterwards, though there be nothing done upon the first; except it be upon matter de puisne Temps, as the death of one of the Defendants, &c. Lib. 8. 66. Lib. 11. 5, 6. Stamf. 155. Bro. tit. Venire facias 2. 35.

Several Venire facias.

But now it is the usual course to have but one Venire facias upon several issues, though against several Defendants. Cro. 3. part. 866. Hob. 36. 64. And so usual, that the Court declared, Cro. 2. part. 550. That there never shall be several Venire facias to try several Issues in one County; for what need the Plaintiff trouble himself and the Country with several, when one Jury will serve his turn; Et frustra fit per plura quod fieri potest per pauciora. But otherwise, if it be in two Counties. Cro. 3. part. 866.

One Venire facias in several issues. Vide Rolls tit. Tryal 596. 620. 667. Hob. 88. 51.

After issue joyned by two Defendants, if one of them dye, and then a Venire facias is awarded betwixt the Plaintiff, and both the Defendants, and so in the Habeas Corpora and Distringas, yet this shall not vitiate

Venire facias between the Plaintiff and two Defendants where one is dead.

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Venire facias between the Plaintiff and two Defendants where one is dead.

the Venire facias, &c. to make Error; because, though one of the Defendants be dead, yet the other being alive it is sufficient.

No surmise in Judicial Writs, of death in one of the Parties.

And there needs be no surmise in Judicial Writs, that one of the Defendants is dead; It is time enough to shew it to the Court at the day in bank. Cro. 1 part. 426. But if there be two Defendants, and the Venire facias be but against one of them, 'tis Error. 7 H. 4. 13. and Bro. tit. Ven. fac. 11. Cro. 1 part. 426.

Venire facias dated before the Action brought.

If the Venire facias bears date before the Action brought, or varies from the Roll, yet it is aided by the Statutes of Jeofailes. Cro. 1. part. 38. 90, 91. 203, 204. Miscontinuance or discontinuance, or misconveying of Process is aided by 32 H. 8. 30. The want of any Writ Original or Judicial, defaults in their Form, and insufficient Returns thereupon, are aided by 18 Eliz. 14. Cro. 3. part. 259. But you must have a care the Venire facias be not faulty in any other matters of substance; for if the Parties Names be mistaken, or the issue, as if the issue be ne unques Executor, and the Venire facias be in placito debiti, &c. this is a mistryal. Cro. 2. part. 528. So it is if the Venire facias be in placito transgressionis, where the Action is in placito transgressionis, & ejectionis firmæ. This misawarding of Process is not aided by any of the Statutes, and better it were that there had been no Venire facias at all in such a case; for then the Statutes would have holpen it. Cro. 3. part. 622. Stat. 18 Eliz. 14.

Partles Names mistaken in a *Venire facias.*

Mis-tryal.

No *Venire facias* holpen.

If

Return of Process.

If a Venire facias be directed to the Coroners, all the Coroners ought to joyn in the Return, they being Ministers not Judges, and so both of the Sheriffs of London ought to joyn, or else the return is not good. Hob. 97.

Note, the principal Statutes of Jeofailes are 8 H. 6. cap. 12. and cap. 15. 32 H. 8. cap. 30. 18 Eliz. cap. 14. 21 Jac. cap. 13. and 16 and 17 Car. 2. 8. Intituled, An Act to prevent Arrests of Judgments and superseding Executions. And the three last of these Statutes do not extend to Appeals, nor to Pleas of the Crown, or to any proceedings upon them, for these are excepted, nor to the amendment of any Exigent, to make any one Outlawed. As you may see at large, Lib. 8. 162. Blackamore's Case.

Note, if the Distringas be betwixt wrong Parties, as if the Parties Names are mistaken, the Judge of Assise cannot proceed if the mistake be insisted upon, altho it would have been no Error after Verdict; held so before Justice Windham, Lent Assises, 1681. And so I have known it ruled by other Judges, and the Expal refused. Sir Littleton's Reports 253.

And the four last of the said Statutes do neither extend to them nor to Actions or Informations upon Penal Laws, only in the last of them, viz. 16, 17 Car. 2. there is a limitation in the negation of the Extent, scil. Other than concerning Customs, Subsidies of Tonnage and Poundage, to which it doth extend.

If the Venire facias be directed Vicecomiti London, Salutem, &c. præcipimus tibi, and not vobis, after Verdict this is amendable. 39 Eliz. B. R. Adjudge, Rolls 200.

And so it is, if after & habeas ibi hoc breve, & Nomina Juratorum be left out, ibid. and 204.

But if the date of the Teste be after the Return, this was held not amendable, 32, 33 Eliz. B. R. ib. sed vide hic ante. But if the Award of the Venire facias upon the Roll be right, and the Writ wrong, it may be amended by the Roll, as the misprision of the Clerk. ibid. 201.

If the words, quorum quilibet habeat be left out, or duodecim, or qui nulla affinitate attingunt, or Vicecomiti be left out, these are amendable as mistakes of the Clerk. Rolls 204, 205.

Venire facias between a Party and a Stranger.

In some Cases a Venire facias shall be awarded to make an Enquest betwixt a Stranger to the Writ and Issue, and the Party. I will instance but in one, and that is upon the Statute of Westm. 2 cap. 6. If a Tenant being impleaded vouch to Warranty, and the Vouchee denieth the Deed, or other cause of the Warranty, &c. that the Demandant may not hereby be delayed, he may sue out a Venire facias to try the Issue between the Tenant and Vouchee.

Inquest at whose request.

Inquests in Pleas of Land, shall be as well taken at the request of the Tenant, as of the Demandant. 2 Edw. 3. cap. 16. If the Plaintiff or Demandant, desisteth in prosecuting his Action, and bringeth it

not

not to Tryal, then the Defendant or Tenant may sue forth a Venire facias with a Proviso, which is to no other end but that the Sheriff should summon but one Jury, if the Plaintiff also should have brought him another Writ, to the same purpose; and although (as my Lord Dyer saith, fol. 215.) the granting of this Venire facias, &c. with a Proviso, depends much upon the discretion of the Court, yet for the greater part it is not grantable for the Defendant, unless when he is actor as well as the Plaintiff, or unless there be a default, and Laches in the Plaintiff; therefore there can be no Tryal by Proviso against the King (unless with the Attorny General's consent) because no default or Laches can be imputed to the King. But an avowant in Replevin, may have a Venire facias with a Proviso, immediately after issue joyned, because he is Actor, and in nature of the Plaintiff.

Venire facias by Proviso.

Proof presently after Issue joyned.

If the Plaintiff in Detinue and the Garnishee be at issue, and the Plaintiff prays a Nisi prius, and this is granted, yet the Garnishee at the same time may have a Nisi prius with Proviso, because he is Plaintiff also. 19. Lib. 6. 46. Rolls Tit. Tryal 629.

Garnishee.

If the Plaintiff deliver the Writ to the Sheriff tarde, so late that he cannot serve it, the Defendant shall have a Writ with a Proviso.

Tarde.

But at the same time the Plaintiff may have another Writ, and the Sheriff may return which of them he pleases at his Election. 8 H. 6. 6.

The Proviſo ought to be, quando duo brevia ſunt in eodem gradu & qualitate.

If the default be in the Plaintiff after iſſue in the proſecuting of the Venire facias, then the Defendant may have a Venire facias with Proviſo, but not a Habeas Corpus with a Proviſo, until the Plaintiff have made a default in the ſame Writ, for he ought only to have the ſame Proceſs with a Proviſo, in which there was a default of the Plaintiff firſt: and therefore although the Defendant had a Venire facias with a Proviſo upon a default of the Plaintiff, yet he cannot have a Niſi prius by Proviſo, without another default of the Plaintiff.

If the Defendant had a Habeas Corpus by Proviſo, and the Jury remain for want of Hundredors, yet he cannot have a Diſtringas Jur. with a 10. Tales cum Proviſo, until a default of this requeſt of a Tales is in the Plaintiff. D. 15 El. 318. 10.

How the Plaintiff may ſtop the Defendants Proviſo.

But note the Nota (in Stamford's Pleas, del Coron. f. 155.) That if by negligence of the Plaintiff, the Defendant ſues a Venire facias with a Proviſo, yet the Plaintiff may at his pleaſure ſtay the Defendant, that he ſhall not proceed in his Proceſs, in praying a Tales upon the Defendants Proceſs, as it appears T. 15 H. 7. f. 9. And the Defendant ſhall never be received to purſue this Proceſs with a Proviſo, ſo long as the Plaintiff purſues, or is ready to purſue, as appears Mich. 14 H. 7. f. 7.

Tales Men.

And ſeeing the Tales Men offer themſelves to us, we will tell them upon what account they come, before they thruſt themſelves into

to the Inqueſt, commonly for the love of eight Pence; but it may be to do ſome of their Neighbours a ſhrewd turn.

CAP. V.

Why the *Venire facias* runs to have the Jury appear at *Weſtminſter*, though the Tryall be in the Country. Of the Writ of *Niſi prius*, when firſt given, when grantable, when not, and in what Writs. Of Juſtices of *Niſi prius*. Of the *Tales* at Common Law and by Statute. When the Tranſcript of the Record of the *Niſi prius* differs from the Roll, whereby the Plaintiff is Nonſuited, he may have a *Diſtringas de novo*.

BUT to obſerve the method of the Writ, the next words are, Coram Juſticiariis noſtris de Banco apud Weſtminſt. tali die. And here firſt of all you may ask me, to what purpoſe the Sheriff is commanded to cauſe the Jury to come to Weſtminſter, when they are to try the Cauſe in the Country, and in truth are not to come to Weſtminſter? I muſt confeſs the reſolution of this Queſtion is not unneceſſary:

wherefore we must know, That Originally, before the Writ of Nisi prius was given, the purpose for which the twelve Men were to be summoned upon the Writ of Venire facias to come to Westminster, was that contained in the Writ, videl. Ad faciend. quandam Juratam; for then was the Tryal intended to be there, if a full Jury appeared; if not, then a Habeas Corpora, (with a Tales sometimes annexed to it, the form whereof you may see in the Register,) and if they did not appear at the Return in the Habeas Corpora, then went out the Distringas. This I speak of the Common Pleas: But the course of the Kings-Bench and Exchequer, is, after the Venire facias, to have a Distringas, leaving out the Habeas Corpora. Tryals then were all at the Bar. (I speak not of Assises.) But now, because Jurors did not use to appear upon the Venire facias, it being without Penalty; Tryals at the Bar, are appointed upon the Habeas Corpora, and Distringas, because the Jury will more certainly appear at the day in the Distringas, through fear of forfeiting issues; which the Sheriff returns on the Distringas, not on the Venire facias. By the Statute of 18 El. cap. 5. no Jury shall be compelled to appear at Westminster, for the Tryal of an offence upon (any penal Law) committed above thirty Miles from Westminster, except the Attorny General can shew reasonable cause for a Tryal at Bar.

Why the *Venire facias* is to have the Jury appear at *Westminster*.

Hab. Corp.

Distringas.

Tryals at Bar.

Where a Jury is not compellable to appear at *Westminster*.

Thus it was at Common Law, before the giving of the Writ of Nisi prius, when all Jurors, together with the Parties came up to

to the Kings higher Courts of Justice, where the Cause depended; which (when Suits multiplied) was to the intollerable burthen of the Country, 27 E. 1. cap. 4. Wherefore by the Statute of Westminster, 2. cap. 30. A Writ of Nisi prius was first given; and that in the Venire facias, as we may see in the form of the Writ there mentioned, scil. Præcipimus tibi quod venire facias coram Justiciariis nostris apud Westmon. in octabis Sancti Michaelis, nisi talis tali die & loco ad partes illas venerint 12. &c. By which Writ it appears that the Venire facias was not returnable till after the day of the Nisi prius. But the mischief thereof was so great, partly in respect that the Parties not knowing the Jurors Names, could not tell how to make their Challenges, and so were surprised; and partly in respect of the Jury, who were greatly delayed by the Essoyns of the Parties, that by the Statute of 42 E. 3. cap. 11. It is Ordained, That no Inquest, but Assises and deliverances of Goals, be taken by Writ of Nisi prius, nor in other manner, at the Suit of the great or small, before that the Names of all them that shall pass in the Inquests be returned in the Court. And their names must be returned upon a Pannel annexed to the Venire facias, so that either Party may have a Copy of the Jury, that he may know whom to challenge, and the Jury not coming upon the Venire facias, make a feigned default, which warrants the Distringas, &c. unless they appear at the day of Nisi prius.

Nisi prius, when first given, and wherefore. (u. B. 2)

Stamfords Pleas of the Crown. 156.

Nisi prius in the *Venire facias*.

The Names of the Jurors must be returned into the Court before any Tryal, and why.

So

It is in the Courts discretion, whether to grant a *Nisi prius* or not.

So that by what hath been said, you may perceive to what purpose the Sheriff is commanded to cause the twelve Men to come to Westminster, though the Tryal be in the Country. And that, ad faciend. quandam Juratam, because it is in the discretion of the Court, whether to grant a Writ of Nisi prius, or to have a Tryal at the Bar. And for this, the Duke of Exeter being Plaintiff in Trespass, a Nisi prius was prayed for the Duke, and it was denied, for that the Duke was of great power in that County. And if the Tryal should be had in the Country, inconvenience might thereupon follow, as you may read, 2 Inst. 424. and 4 Inst. 161. Nay in some Cases (as if the Cause require long examination, &c.) it is not in the power of the Court to grant a Nisi prius, if the King please: for in such Cases, as appears by the Writ in the Register, 186. the King by his Writ may restrain, and command the Justices that they shall not award any Writ of Nisi prius, and if they have, that they supersede it. F. N. B. 240, 241. No Nisi prius shall be granted where the King is party, without especial Warrant from the King, or the Attorny Generals consent. Stamf. 156. F. N. B. 241. 4 Inst. 161.

When the Court cannot grant a *Nisi prius*.

Where the King is concerned.

In a Præcipe quod reddat, if the Tenant after aid of the King, pleads to the Inquest; the Plaintiff shall not have a Nisi prius, because the Tenant hath aid of the King, and so the King is in a manner Party. 25 E. 3. 39. Neither is a Nisi prius to be granted, if any of the Parties may have prejudice by it.

If

If the Justices de Nisi prius dye before the day in Bank, yet the Record shall be received from the Clerk of Assise, without a Certiorari, or other form of Entry but the ancient form.

Certification of Verdicts.

Also in that Case a Certiorari may be directed to the Executors or Administrators of the Justices, to certifie the Record, D. 4, 5 Mar. 163. 55. Rolls Tit. Tryal 629.

They have no power to increase Damages, nor to allow or disallow Protections, nor to allow a Plea of Excommengement in the Plaintiff. But they may Record the Protection and the Default, and this shall be allowed or disallowed in B.

What things the Justices of *Nisi prius* may do.

They may demand the Jurors upon a Pein, they may amerce Jurors, and punish a Trespass done in their presence, which is in despite of the King, and for this make Process, and may fine Offenders.

Jurors surpaine fine.

In Ejectment the Defendant may plead at the Assises, that the Plaintiff hath entred into parcel of the Land mentioned in the Declaration puis le darrein continuance, and the Justices of Nisi prius may accept this Plea. for it is in their Election; for if they perceive the Plea is dilatory, they may refuse it, for it is at their discretion. Sir Hugh Browns Case, in Scaccario. Mich. 8 Jac. Rolls Tit. Tryal 630.

Plea puis darrein continuance.

If eleven Jurors be sworn, and the twelfth is challenged, and the Jurors cannot agree in the challenge; for ten affirm the challenge, and the other denies it, although the Party which did not take the challenge will not agree that the eleven sworn shall have another

The power of the Judge upon disagreement or other matter.

Challenge.

another to them in lieu of him that is challenged, yet Court may do this.

If a challenge be taken to the Array before any Juror is sworn, and Tryors be chosen, who cannot agree, yet they shall not be commanded in custody, because they never were sworn upon the principal. But the Court may discharge them and chuse others.

Jurors discharge.

If there be three Tryors who will not agree, the Court cannot take the Verdict of two, and command the other to Prison. The same Law in case of a Verdict upon an issue.

Where fourteen Jurors are impannelled for the King, the Judge cannot discharge any of them after they are sworn, if not that they will not agree with their Companions.

Amercement.

If the Jury say upon demand of the Court, that they are agreed, and afterwards when they are opposed, they say the contrary in any matter, they may be amerced for this. Rolls Tit. Tryal 675.

Nisi prius, why so called.

And now since the Nisi prius (for so it is called, because the word prius is before venerint in the Distringas, &c. which was not so in the Venire facias, upon the Statute of W. 2. cap. 30. before rehearsed,) must not be in the Venire facias, because the Names of the Jurors are to be returned to the Court, before the granting of the Nisi prius; therefore the Nisi prius is now in the Habeas Corpus and Distringas. And if the Sheriff return not a Pannel of the Jurors upon the Venire facias, there shall be no Nisi prius upon the Tales, until a Pannel be returned.

No *Nisi prius* before the *Venire facias* returned.

27 H. 6. f. 10. 1 H. 5. f. 11. which brings me again to speak of the Tales.

A Tales is a supply of such Men, as were impannelled upon the Return of the Venire facias, grantable, when enough of the principal Pannel to make a Jury do not appear, or if a full Jury do appear, yet if so many are challenged, that the residue will not make a Jury, then a Tales may be granted. And this at the Common Law was by Writs of Decem tales, Octo tales, &c. (out of the Kings Courts) one of them after another, as there was need, until there was a full Jury. But now by the Statutes of 35 H. 8. 6. 4, 5. P. M. 7. 5 Eliz. 25. and 14 Eliz. 9.

The Tales at Common Law.

Tales by Statute.

The Justices of Assise, and Nisi prius, at the Request of Plaintiff or Demandant, Defendant or Tenant, or of the Prosecutor tam quam, if (two, more, or but one of the principal Pannel appear at the day of Nisi prius, may presently cause a supply to be made of so many Men as are wanting, of them that are there present standing about the Court; and hereupon the very Act is called a Tales de circumstantibus.

Note the difference between Tales at Common Law, and Tales by the Statute, the first called only [Tales,] the second [Tales de circumstantibus,] the last of which cannot be granted at a Tryal at Bar, which is a Tryal at Common Law; for there it must be only [Tales] by Writ annexed to the Venire facias. But Tales de circumstantibus is given by Statute to Tryals by Assise and Nisi prius, per Stat. 35 H. 8. 6. Yet such a Tales to an Indictment in Wales, was out of that Sta-

Statute, and helped by the 4 and 5 Ph. and Mar. 7.

Tales, in what cases it shall granted.

If the Issue be to be tryed by two Counties, and one full Inquest appear of one County, but the Inquest remain for default of Jurors of the other County, a Tales shall be awarded to the County where the default is, not to the other.

If a Juror dye after he is Impannelled, a Tales shall issue, not a Venire facias.

What persons may have a *Tales*.

Upon a Pluries Distringas, three only appear, the Plaintiff prays another Distringas, without praying a Tales, yet if the Defendant pray a Tales, the Court ought to grant it. D. 20 El. 359. 2.

In what Cases.

A Tales shall be granted in an Attaint, if all the Grand Jury make default.

At what time.

It cannot be granted at the day of the return of the Venire facias.

If the Venire facias be good, and the Habeas Corpus ill, if the Pannel be affirmed, yet the Tales is void, for in effect there is only a Venire facias returned, and then no Tales.

Tales with a *Proviso*.

If the Defendant hath a Habeas Corpus with a Proviso, yet the Tales ought not to be granted with a Proviso, at the Defendants request, before a default in the request of a Tales in the Plaintiff.

At Common Law before the Statute, by custom of a Court a Tales de circumstantibus might be granted, for this is a good Custom. Dubitatur, Rolls Tit. Tryal 672.

Tales denied.

If great persons are concerned, and by their labouring the Jury doth not appear, and Tales Men are prepared for their turn, and

and there is a great tumult de circumstantibus; the Justices of their discretion may deny a Tales, and adjourn in Bank, notwithstanding the Statute. The principal Pannel must stand, or else there can be no Tales.

If the Bayliff of the Franchise answer, that there be not sufficient of his Bailywick, the Justices may award a Tales de circumstantibus to be returned by the Sheriff.

If the Tenant for Life pray in aid of the King, who hath the reversion, the Justices cannot grant a Tales de circumstantibus, because the King is concerned.

If two Coroners or Esliers return the Pannel, one of them cannot return the Tales, &c.

If the Defendant sue the Writ of Nisi prius by Proviso, yet the Plaintiff may have a Tales, &c.

The Sheriff may return twenty four, forty, or any number upon the Tales de circumstantibus. And it may be prayed by Attorny (although the Statute doth not mention an Attorny) as well as in proper person. The Vouchee in a Præcipe quod reddat may pray a Tales, though he be neither Plaintiff nor Demandant in the first Action.

If there be three Plaintiffs in Replevin, &c. and one of them makes default at the Nisi prius, the other two cannot pray a Tales; otherwise of two Copartners.

Mayor and Commonalty in their proper persons cannot pray a Tales: A Bishop or Abbot may.

Attorny.

Two

Two Plaintiffs in Treſpaſs, and at the Niſi prius the Defendant ſhews a Record to the Court, by which it appears that one of the Plaintiffs was outlawed after the laſt continuance, the other cannot pray a Tales.

The Sheriffs upon the Tales de circumſtantibus may Impannel a Prieſt or Deacon, if he hath ſufficient Free-hold of Lay Fee, but not an Infant, nor one of the Age of eighty years.

What Perſons of the *Tales*.

He may Impannel Coroners, Capital Miniſters of any Corporation, Foreſters, Men Blind, Mute (if they have their underſtanding, but not deaf Men) Excommunicated Perſons, but not Outlawed or Attaint, not Aliens, nor Clerks Attainted, nor Perſons Attainted of falſe Verdicts.

The Coroners may put the Sheriff on the Tales.

Challenge.

It ſeems by the Statute, none of the parties can challenge the Array of the Tales, but only to the Poll.

After a challenge to the Poll tryed, there ſhall be no other challenge to the ſame Poll, for any cauſe or matter that is at the ſame time.

In an Action of Treſpaſs for taking away the Plaintiffs Pony, one of the Tales was challenged, becauſe he was a common Fofterer of Thieves, and dwelt in a ſuſpicious place, and of ill Fame, and held a good challenge.

For Challenges, ſee the Title Challenge at large.

What

What Iſſues ſhall be tryed by Tales de circumſtantibus, ſee Williams's Reading, & hic cap. 7.

But ſince none can come after the Repoꝛter, obſerve with me his Nota Lecteur in his 10th Repoꝛt 104. That at Common Law, in the granting of a Tales five things are to be conſidered.

1. The time of the granting, &c. thereof.
2. The number of the Tales.
3. The oꝛder of them.
4. The manner of Tryal, that is, where by them with others, and where by them only.
5. The quality of them is to be conſideꝛed.

As to the firſt, four things are likewiſe to be conſidered.

1. That the time of granting them is upon default of ſo many of the pꝛincipal Pannel, that there cannot be a full Inqueſt.

At *Wickam* Aſſiſes in *Bucks*, 1684. Only one Juror appeared, who was challenged, but before he was ſet aſide the Court granted a *Tales*, by *Mountague* Chief Baron.

2. That at the time of granting them, the pꝛincipal Array ſtand; foꝛ Tales are woꝛds ſimilitudinary, and have reference to the Aſſemblance, which then ought to be in eſſe; and theꝛefoꝛe if the Array be quaſhed, oꝛ all the Polls challenged and treited, no Tales ſhall be awaꝛded, foꝛ then there are not Quales, but in ſuch a Caſe, a new Venire facias ſhall be awaꝛded. But if at the time of granting the Tales, the pꝛincipal Pannel

ſtand, and afterwards is quaſhed, as aforeſaid, yet the Tales ſhall ſtand; for it ſufficeth if there were Quales at the time of granting the Tales.

3. It is to be obſerved, That he which is meerly Defendant, cannot pray a Tales till the Plaintiff hath made default.

4. In ſome Caſes a Tales ſhall be granted after a full Jury appear and is ſworn; as if a Jury be charged, and afterwards before a Verdict given in Court, one of them dye, a Tales ſhall be awarded, and no new Venire facias: and ſo if any of the Jurors Impannelled dye before they appear, and this appears by the Sheriffs return, the Pannel ſhall not abate, but if there be need, a Tales ſhall be awarded. And the time for Challenge and Tryal of the Tales, is after the principal Pannel be tryed; and if the principal Pannel be affirmed, the ſame Tryors ſhall try the Tales; but if it be quaſhed, then the two Tryors of the principal ſhall not try the Tales.

As to the ſecond, to wit the number, two things are to be obſerved.

1. That in all Caſes, the Tales ought to be under the number of the principal in the Venire facias (unleſs in Appeals) as in Attaint under twenty four, and in other Actions where the Venire facias is of twelve under twelve. And the reaſon wherefore more than the number may be granted in Appeals of the Plaintiffs part, is becauſe the Defendant may challenge peremptorily; and if default be in the Plaintiff, then the Defendant may pray a Tales, and the Reaſon is in favorem vitæ,

vitæ, and that he may expedite and free himself from vexation, and the question of his life, for fear that his Witnesses should dye.

2. That the number ought always to be certain, as ten, eight, six or four, &c. But now by the Statute of 35 H. 8. a Tales de circumstantibus may be granted, as well of an uncertain as a certain number, and that by force of these words in the Statute 35 H. 8. So many, &c. as shall make a full Jury.

As to the third, to wit, the Order, It is to be known, That always in every new Tales, the number shall be diminished, as if the first be ten, the second shall be eight, and so always less. But if the Tales awarded be quashed by challenge, you may have another of the same number.

As to the fourth, to wit, the manner of Tryal, that is commonly by them with others, but by them only, when after the granting the Tales, the principal Pannel is quashed, then the Tryal shall be only by the Tales, or if the Tales do not amount to a full inquest, another Tales to supply the former may be granted.

As to the fifth, to wit, the Quality of the Tales, they ought to be of the same Quality as the Quales are; and therefore if the first be per medietatem linguæ, of English and Aliens, so ought the Tales to be; so if the Principal be out of a Franchise; so if the Venire facias be directed to the Coroners, so ought the Tales; and all things which are required by Law in the Quales are required in the Tales, as you may read in the aforesaid

Therefore if the *Venire facias* be not *de medietat. linguæ*, the *Tales* cannot. 3 E 4. 12.

said Statutes. Vide Stamf. Plees del Corone, f. 155.

Where a Juror is withdrawn, when the Plaintiff intends to bring the Cause to Tryal again, he may have a Distringas, &c. with a Decem Tales.

Attaint.

By the Statute of 23 H. 8. cap. 3. If there be not enough sufficient Freeholders as are required in an Attaint, in the County where such Attaint is taken, a Tales may be awarded into the Shire next adjoyning.

Nisi prius amendable.

If the Transcript of the Record of the Nisi prius be mistaken, and not warranted by the Rolls, for which cause the Plaintiff becomes Non-suit, he may have a Distringas de novo, upon motion to the Court, and the Postea shall not be recorded, Cro. 1. part 204. Palmers Reports 378. For there is but a Transcript of the Record sent to the Justices of Nisi prius.

Justices of *Nisi prius*, and Justices of Assise.

First they were Justices of Assise, and therefore they retain that name still, though Assises are very rarely brought; for this common Action of Ejectment hath Ejected most real Actions, and so the Assise is almost out of use.

CAP.

CAP. VI.

Of the number of the *Jurors*, and why the Sheriff returns twenty four, though the *Venire facias* mentions but twelve: If he returns more or leſs, no Error, and of the number twelve. And when the Tryal ſhall be *per primer* Jurors. And of Inqueſts of Office; and when to remain *pro defectu Juratorum.*

NOw for the Quales; and theſe you ſee for number muſt be twelve, by the Common Law, Doct. and Stud. f. 14. For quality, liberos & legales homines. And firſt of their number twelve: and this number is no leſs eſteemed of by our Law than by Holy Writ. If the twelve Apoſtles on their twelve Thrones, muſt try us in our Eternal State, good reaſon hath the Law to appoint the number of twelve to try our Temporal. The Tribes of Iſrael were twelve, the Patriarchs were twelve, and Solomon's Officers were twelve, 1 Kings 4. 7. vide Sir Henry Spelman, verb. [Jurata] Therefore not only matters of Fact were tryed by twelve, but of ancient times twelve Judges were to try matters in Law, in the Exchequer Chamber, and there were twelve Councellors of State for matters

Of the number 12.

Joſh. 4. Geneſ. 49.

Plow. Com. in procemio. 12 Judges.

of State; and he that wageth his Law, must have eleven others with him, which think he says true. And the Law is so precise in this number of twelve, that if the Tryal be by more or less, it is a Mis-Tryal; but

Less than 12 in Inquests of Office.

in Inquests of Office, as a Writ of Waste, there less than twelve may serve. F. N. B. 107. c. And in Writs to enquire of Damages, the just number of twelve is not requisite, for they may be over or under; and

Finch 400, 484.

so it was resolved Trin. 1651. B. R. Abbot vers. Holt, that the Sheriff ought (in Writs

Inquests of Office. *Vide hic* cap. 13.

of Inquiry) to summon twelve by their Names, yet Damages assessed by a less number is sufficient, and in the Writ to the Sheriff, quod ipse inquirat per Sacramentum proborum hominum, omitting [duodecim] its good and usual.

And in a Writ of Inquiry of Waste by thirteen, it was holden good. 1 Cro. 414.

In Dower if the Tenant come at the Grand Cape, and say he was always ready to render Dower, and issue is taken upon this, although seisin of the Land be presently awarded, yet no Inquest of Office, but the Jury upon the Tryal of the Issue shall assess Damages. 22 E. 3. 15.

In what Cases there shall be an Inquest of Office, and in what not, see Rolls tit. Tryal 595.

Why the Sheriff returns 24.

And although there can be no Verdict but by twelve, yet by ancient course and usage, (which as the Lord Cook tells you, makes the Law in this Case, 1 Inst. 155.) the Sheriff is to return twenty four. And this is for expedition of Justice; for if twelve should only

only be returned, no Man should have a full Jury appear or sworn, in respect of Challenges, without a Tales, which should be a great delay of Tryals; and for this cause at Common Law, 'twas Error if the Sheriff returned less than twenty four. But now it is remedied by the Statute of 18 Eliz. as a mis-return, see Cro. 1 Part. 223. Lib. 5. 36, 37. By which Books it appears, that if the Sheriff return but twenty three, &c. it shall not vitiate the Verdict of twelve, no, though a full Jury do not appear, so that the Tryal is by ten of the principal Pannel, and two of the Tales, notwithstanding Maynards Opinion to the contrary, and Cro. 3 part 587. The Sheriffs used to summon above twenty four, scil. effrænatam multitudinem, but now they are prohibited by Statute to summon above twenty four. Westm. 2. cap. 38.

If the Sheriff return less than 24 it is no Error.

Keeble 1 part 310.

Must not return above 24.

If the Issue be to be tryed by two Counties, if but one of one County appear, although a full Inquest appear of the other, yet this shall remain for default, because they cannot try that which is in another County. There ought to be six of each County. And so of one Inquest out of a Franchise, and another out of the Guildable, and so of two Pannels returned in an Assise by several Bayliffs of Franchises to try one issue, and one Pannel makes default, the issue shall not be tryed by the other Pannel, for the Jurors in one Franchise cannot make the view in another Franchise. Roll. tit. Tryal 673.

In What cases the Inquest shall remain for default of Jurors.

Two Counties.

The manner of swearing the Jurors.

If the Jury be of two Counties, or two Pannels of the Guildable and Franchise, &c. they shall be sworn interchangably first, one of one, then another of the other.

If the Jury go at large until another day after they are sworn, and the Roll of the entry be not in Court, they may be sworn anew. Roll tit. Tryal 674.

Where there must be 16. and 24. in a Jury.

To make a Jury in a Writ of Right, which is called the Grand Assise, there must be sixteen, scil. four Knights, and twelve others; the Jury in Attaint, called the Grand Jury, must be twenty four. Finch 412. and 485. But if the issue be upon a matter out of the point of the Attaint, as upon a Plea of non tenure, the Tryal shall be by twelve Juratores. 21 E. 3 10.

There may be more than sixteen in a Writ of Right. Rolls tit. Tryal 674.

Where Witnesses joyn with the Jury, the number is uncertain.

When Process used to be made out against the Witnesses in Carta nominat. to joyn with the Jury in Tryal of the Deed, as was used before the Statute of 12 E. 3. c. 2. [his Testibus] being then part of the Deed, then the number was uncertain, according as the number of Witnesses were in the Deed: wherefore no Attaint lay, if the Deed were affirmed, because more than twelve joyned in the Verdict. But otherwise if the Deed was not found, because Witnesses cannot prove a Negative. F. N. B. 106. h. 1 Inst. 6. 2 Inst. 130. &c.

Cannot prove a Negative.

Juror departs and another sworn by consent.

If twelve are sworn, and one of them depart by consent, another of the Pannel may be sworn, and joyn with the other eleven in the Verdict. 11 H. 6. 13.

In

In Error upon a Judgment in Cornwal, A Jury of six.
because the Tryal was but by six, adjudged that it was erroneous, though it was returned secundum consuetudinem ibidem ante, &c. for such customs are against Law, unless in Wales, which are permitted by Act of Parliament. Cro. 1 part. 259.

If the Record be pleaded in Bar of the Assise, and the Party that pleads says, the same Tenements were put in view to the former Jurors: If the Plaintiff saith nient compriſe, this shall be tryed per primer Jurors & auters. 13 H. 4. 10. Per primer Jurors. See hic cap. 4.

So if the Tenant saith that these Lands are not the same Lands before recovered, this shall be tryed per primer Jurors & auters. 22 Assise 16. and so in a Redisseisin.

So in an Assise, if the Defendant plead a Recovery per view de Jurors in another Assise, this shall not be tryed by the Assise, but per primer Jurors. 13 H. 4. 10.

And if at the return of the former Jurors and others, all the former Jurors appear, the Tryal shall be by them only; but if any do not appear, they shall be supplied by the others. 40 Assise 4.

In such cases where the Plaintiff is not to recover the Land, nor to defeat the former Judgment, if nient compriſe be pleaded upon a Recovery pleaded, this may be tryed by other than the former Jurors. 1 H. 6. 5.

As in Trespals for Trees cut, the Defendant pleads that he recovered before in an Assise the same Land where, &c. and cut, &c. the Plaintiff says this Land, where, &c. was not put in view, and so nient compriſe.

This

This shall not be tryed by the first Jurors, but by others, because this Action doth not defeat the former Judgment, nor recover any thing but Damages. Note the difference 1 H. 6. 5. Where the Tryal shall be per primer Jurors, and where by them and auters, and where only per auters, see Rolls tit. Tryal 593.

Certificate of Assise, what.

This is where a Bayliff of a Tenant in an Assise pleadeth, &c. and loseth by the Assise, and the Tenant himself hath a Release or some other discharge to plead, then he may by this means have the Parties and first Jurors to appear again, and if it be found, he that before recovered shall lose the Land, and yield double damages. Terms of Law.

CAP. VII.

Who may be Jurors, who not; who exempted, and of their Quality and Sufficiency.

Jurors must be *Liberi*. *Vide* 2 Inst. f. 27.

SO much for their Number, next their Quality is to be considered; and for this the Writ informs you who they ought to be, 1 Liberos, that is, Freemen, not Villains or Aliens; and that not only Freemen and not Bond; but also those that have such freedom of mind that they stand indifferent, without any Obligation of Affinity, Interest, or any other Relation whatsoever

ſoever, to either Party; ſometimes the word Probos inſtead of Liberos is attributed to them; they are both good Epithetes for a Juror, but I eſteem the firſt as moſt ſignificant. Forteſcue cap. 25.

Error of a Judgment in the Marſhalſea, the Venire facias being Probos & Legales, not ſaying as the Regiſter is, Liberos homines, &c. ſed non allocatur, but Judgment affirmed, Keeble. 1 part, 563. *Saunders againſt Leek.*

2. They ought to be Legales, not outlawed, nor ſuch as have loſt Liberam Legem, or become infamous, as Recreants, perſons attainted of Felony, falſe Verdict, Conſpiracy, Perjury, Præmunire or Forgery upon the Statute of 5 Eliz. cap. 14. and not upon the Statute of 1 H. 5. 3. Not ſuch as have had Judgment to loſe their Ears, ſtand on the Pillory or Tumbrel, or have been ſtigmatized or branded, nor Infidels, neither can any ſuch be Witneſſes. 1. Inſt. 6. Legales.

3. Homines; they ought to be Men (yet there ſhall be a Jury of Women to try if a Woman be Enſeint, upon the Writ de ventre inſpiciendo.) But what kind of Men theſe ought to be, is worthy to be known. And for this ſome Men are exempted from ſerving in Juries, in reſpect of their Dignity, as Barons, and all above them in Degree. Many are exempted by the Writ de non ponendis in Aſſiſis, F. N. B. 166. as aged perſons ſeventy years old, and many others are exempted, as Clerks, Tenants in ancient Demeſne, Miniſters of the Foreſt (out of the Foreſt) Coroners, Infants under the age of fourteen years, Officers of A Jury of Women. Exemption of Juries. Who are to be exempted from Juries.

of the Sheriff, ſick decrepit Men, and ſuch as are exempted by the Kings Charter: yet in a Grand Aſſiſe, Preambulation, Attaint, and ſome other ſpecial Caſes, ſuch Men as are not exempted by reaſon of their Dignity ſhall be forced to ſerve notwithſtanding their Exemption in other Caſes. See Daltons Office of Sheriffs, f. 121. 52 H. 3. cap. 14. 2 Inſt. 127, 130, 378, 447, and 561. Counſellors, Attornies, Clerks, and other Miniſters of the Kings Courts are not to ſerve on Juries; but I find one Jury made of Attornies of the Common Bench and Exchequer, in a Caſe brought upon a Bill in the Exchequer, by Sir Thomas Seton, Juſtice, againſt Luce C. for calling of him Traytor in the preſence of the Treaſurer and Barons of the Exchequer. And this Jury of Attornies gave the Juſtice one hundred Marks Damages. 30 Aſſiſe 19.

A Jury of Attornies.

The Court frequently order a Jury of Merchants to try Merchants Affairs.

In what caſes they ſhall be diſcharged by Charter.

If the Charter of exemption be, that he ſhall not be put in Juratis Aſſiſis ſeu recognitionibus aliquibus, yet this ſhall not excuſe in a Writ of Right upon Tryal of the Grand Aſſiſe, for he comes not in in this Caſe by ſuch Proceſs as in other Caſes, but is choſen by the Oath of the four Chivaliers, and now he is in a manner Judge in this Caſe. 39 E. 3. 15.

Neither ſhall it exempt him in an Attaint, nor in a Grand Inqueſt, to inquire of Felonies, &c. becauſe the Charter hath not this Clauſe, Licet tangat nos & hæredes noſtros. 42 Aſſ. 5.

At

At the Nisi Prius the Bayliffs of a Hill may shew a Charter, that to try Contracts, &c. within the Hill the Inquest shall be all of Denizens without Foreigners, and this shall be allowed, and the Foreigners shall be ousted. 29 Ass. 15. At what time and how the Charter shall be allowed.

So may the Burgesses, who are put upon a Jury out of the Borough, if they have such a Charter. 39 Ass. 1.

If a Man be Impannelled of an Inquest and shew such Charter of Exemption of the same King in whose time he shews it, this ought to be allowed without Writ. 39 E. 3. 15. Rolls ib. 633. Allowed without Writ.

The King may grant one or two to be discharged of Juries, but not the whole Country, for by this means there would be a failer of Justice; but the Grant shall not exempt any from serving in the Kings Bench, without express Words.

The Jurors ought to come in person and claim priviledge, the Sheriff cannot return it.

4. De vicinet. de C. It is not sufficient that they dwell in the County, but they are to be of the neighbourhood, nay le plus procheins to the place of the Fact, as by Artic. super. cap. 9. it is appointed: they must be most near, most sufficient, and least suspicious, ib. as I shall shew hereafter. Visne.

5. Quorum quilibet habeat quatuor libras terræ, tenement. vel reddit. per annum ad minus; This is their sufficiency, where the Debt or Damages (or both together, 1 Inst. 272.) amount to forty Marks or above. The sufficiency of Jurors in other Cases of lesser moment Sufficiency of Jurors.

moment, is still left to the discretion of the Justices, Forteſcue, cap. 25. who (experience tells us) never require Jurors under 4 l. per annum, according to the Statute of 27 Eliz. cap. 6. before which Men of 40 s. per annum ſerved; but neither this nor the Statute of 35 H.8. extend to Juries in Cities, Towns Corporate, or other priviledged places, or in the twelve Shires of Wales, ſo that there they ſhall be returned, as before they lawfully might have been; for the Jurors ſufficiency in Attaints, ſee the Statutes 15 H 6. 5. 18 H. 6. 2. and 13 H. 8. 3.

As to the Statute 35 H. 8. 6. The tryal ordained by that Statute, lyes only in ſuch Actions, which have their ordinary tryal by twelve Men, and not more, and by Writ of Niſi prius, and this only in thoſe Actions in which the Proceſs of Venire facias, Habeas Corpora and Diſtringas lyes againſt the Jurors, and in no other Actions.

And although the Statute only mention the Tryal of iſſues joyned in the Kings Courts, commonly holden at Weſtminſter, and if the Action be commenced in any other Court, yet if the Iſſue be joyned in any of the Courts at Weſtminſter, it ſhall be tryed according to the ſaid Statute; and ſo if thoſe Courts are removed from Weſtminſter, the iſſues joyned in them ſhall be tryed as the ſaid Statute directs.

And the Words betwixt Party and Party, ſhall only be intended of common Perſons, and not betwixt the King and any other perſon, nor when the King joyns with any other

other Person, in any Action which by his Release or Pardon may be discharged before the Action brought.

In an Information of Intrusion by the Queen, a Juror was Challenged for insufficiency of Freehold, he had but to the Value of 15 s. a Year. It was adjudged that the Statutes H. 5. 27 Eliz. &c. extend only betwixt Party and Party, and not to the Queen, and if he had any Freehold, it was sufficient, but some Freehold he must have. Cro. Eliz. 38, 413. Sir Christopher Blunts Case.

Which is necessary to be known, in respect of Tales de circumstantibus, &c. See Williams his Readings upon this Statute lately come out in Print; in which there are many ingenious speculations, but because they do not come often in Practice, and the project of this Treatise is only to contain Matters useful for Practisers; that the Book may not swell too big, I omit them, referring you to the Reading it self. See afterwards in the Chapter of Challenges.

It is the general course of the World to esteem Men according to their Estates; For Quantum quisque sua nummorum servat in arca Tantum habet & fidei: And sure I am the makers of this Law had cause enough to do so in this Case; for if Men of less Estates should serve in Juries, such fellows would only be shifted into Inquests as had more need to be relieved by the 8 d. than discretion to sift out the truth of the Fact: 'Tis hard to get an unbyassed

Jury

Jury now; but surely less Rewards would sooner bribe and byals meaner Men than these. Therefore lest poverty or necessity should tempt, every Juror must have 4 l. per annum, as aforesaid, of Free-hold out of Ancient Demesne. And the Court may in matters of great consequence, direct a Venire facias for a Jury above 4 l. per annum, a-piece, but not under. Cro. 2. part. 672. But in such Cases (every one knows) the Court commonly orders the Prothonotary to chuse forty eight, out of the Sheriffs Book of Free-holders, of the most substantial Men in the County, and the Parties strike out twelve a-piece, then the Sheriff returns the rest.

Jurors of above 4 *l. per annum.*

Jurors of 20 l. *per annum.*

V Statut

Note, in former times when Estates of Inheritance were in few Mens Hands, such as had 40 s. per annum, were found sufficient Men to serve on Juries. After Estates of Inheritance coming in greater measure to the Vulgar, it was by the said Statute 27 Eliz. cap. 6. made 4 l. per annum, and the same reason improving in late times, it was thought consisting with the wisdom of a Parliament to raise it to 20 l. per annum, to the end Mens Estates might be trusted in the judgment of more knowing Judges of Fact, when they become litigious, and this was by an Act of 16 & 17 Car. 2. cap. 3. which being but a probationer, and to continue but for three years, and from thence to the end of the next Session of Parliament, it is expired; but for that it may be revived, as I humbly judge it expedient, I have thought fit to hint thus much concerning it.

Such

Such a Man who hath Land, Rent, Office or other profit Apprendre, out of Ancient Demesn, to the clear yearly value of 4 l. of which he may have an Assise, he hath sufficient Free-hold to be a Juror. Vide the said Reading. Where you may know what Estate is sufficient to make a Man a Juror. See hic in the Chapter of Challenges.

But now by the Statute 4 and 5 Will. and Mariæ, all Jurors (other than Strangers per medietat. linguæ) returned upon tryal of issues joyned in the Kings-Bench, Common-Pleas or Exchequer, or before Justices of Assise or Nisi prius, Oyer and Terminer, Goal delivery, or general Quarter Sessions of the Peace, shall have in their own name or in trust within the same County 10 l. a Year, above Reprises, of Free-hold, or Copy-hold Land, or in Ancient Demesn, or in Rents in Fee-simple, Fee-tail, or for their own or some other persons Life, and in Wales 6 l. a Year. If any be returned of lesser Estate, he may be discharged by Challenge, or upon his own Oath; nor shall a Jurors Issues be saved but by order of Court, for reasonable cause proved upon Oath.

The Sheriff, Coroner, or other Minister returning any person of lesser Estate, shall forfeit 5 l. to their Majesties, for every person so returned.

They must be summoned six days before the day of their appearance, and none to take a Reward to excuse a Jurors appearance, on pain to forfeit 10 l. to their Majesties.

This Act extends not to Cities, Boroughs and Towns Corporate.

Tales Men in England shall have 5 l. a Year, in Wales 3 l. a Year.

No Fee or Reward shall be taken by any persons whatsoever, upon the account of any Tales returned, upon pain of 10 l. The one Moiety to the Prosecutor, the other to their Majesties.

No Writ de non ponendis in Assisis & Juratis shall be granted, unless upon Oath that the Suggestions are true.

This Act to be in force for three Years, from the first of May, 1693.

Jurors must not be of affinity to the party.

Et qui nec D. E. nec F. G. aliqua affinitate attingunt, the Law is very cautelous, in not leading men into temptation: Therefore, lest Kindred and Affinity should wrong the Conscience to help a Friend, our Jurors must not be related to any of the Parties; and for this reason likewise the Statutes provide that no Man of Law shall ride Judge of Assise or Goal-delivery in his own Country, 8 R. 2. 2. 33 H. 8. cap. 24. Yet the contrary hereof is often done by a non obstante; but how consistent with integrity or prudence, they know best who procure it to be done. But because most things concerning the quality and sufficiency of Jurors, will come more properly under the Title Challenge, I will refer you thither; and first, observe more particularly, De quo vicinet. the Jury ought to come.

CAP.

CAP. VIII.

Concerning the *Viſne*, from what place the *Jury* ſhall come, &c.

VIcinetum is derived of this Word Vicinus, and ſignifieth Neighbourhood, or a place near at hand, or a Neighbour place, where the Queſtion about the Fact is moved. And the moſt general Rule (ſaith Coke, 1 Inſt. 125.) is, That every Tryal ſhall be out of that Town, Pariſh or Hamblet, or place known out of the Town, &c. within the Record, within which the matter of Fact iſſuable is alledged, which is moſt certain and neareſt thereunto, the Inhabitants whereof may have the better and more certain knowledge of the Fact. Viſne.

And if a thing be alledged in D. the Venue muſt not be of D. but de vicineto de D. for otherwiſe the Neighbourhood would be excluded; Rolls tit. Tryal 622.

And if the Fact be alledged in quadam platea vocat. Kingſtreet in parochia ſanctæ Margaretæ in Civitate Weſtm. in Com. Midd. In this Caſe the Viſne cannot come out of Platea, becauſe it is neither Town, Pariſh, Hamlet, nor place out of the Neighbourhood, whereof a Jury may come by Law; but in this Caſe it ſhall not come out of Weſtminſter but out of the Pariſh of St. Margaret, becauſe that is the moſt certain. But therein alſo it is to be noted, that if it had been al- Pariſh.

ledged in Kingſtreet, in the Pariſh of St. Margaret in the County of Middleſex, then ſhould it have come out of Kingſtreet; for then ſhould Kingſtreet have been eſteemed in Law a Town: For whenſoever a place is alledged generally in Pleading (without ſome addition to declare the contrary, as in this Caſe it is) it ſhall be taken for a Town.

Town.

Parochia.

And albeit Parochia generally alledged, is a place incertain, and may (as we ſee by experience) include divers Towns; yet if a matter be alledged in Parochia, it ſhall be intended in Law, that it containeth no more Towns than one, unleſs the Party do ſhew the contrary. But when a Pariſh is alledged within a City, there without queſtion the Viſne ſhall come out of the Pariſh, for that is more certain than the City.

More 559.

(C 2) 1. If a matter be pleaded done apud Bradford in Forfeild in Parochia de Belbroughton, the Venue ſhall be of Belbroughton, and not of Bradford, for Belbroughton ſhall be intended to be a Town, and one Town ſhall not be intended to be in another Town, and therefore Bradford ſhall not be intended to be a Town. Roll tit. Tryal 619.

The Venue ſhall ever be of the moſt certain place.

(C 6) 6 In a Quo Warranto for uſing a Warren in D. if the Defendant ſay the Ville D. is parcel of the Manor of S. and preſcribes to have a Warren within the ſaid Manor and Demeſnes thereof, the Venire facias ſhall be of the Manor, for the Manor by intendment, is more large than the Vill. If the Viſne be

(8)

de

de D. and S. and the Venire facias be de D. S. and V. this is not good, because it is too large. If apud Burgum de Plimouth, the Venue may be de Plimouth generally. If apud Villam de Cambridge in Warda Fori, and the Venire facias is de Villa & Warda prædict. this is helpt by the Statute of Jeofails.

If the place be out of a Town, the Venue shall not be of the next Town, but from the place it self, but the Sheriff ought to return the Jury, de plus prochein Vill.

In Ejectment of Land in Foresta de Kevennon in Com. the Venue may be de vicineto Forestæ, for this is a place known, and by intendment, because the Defendant hath not pleaded in abatement, this is out of any Parish or Vill.

In inferior Courts within Boroughs, the Venire facias is Quod Venire facias 12. liberos Burgenses Burgi & Parochiæ de B. although there may be twelve Burgesses which are not Inhabitants, Rolls tit. Tryal 622. &c.

The Venue shall follow the Issue. Vide postea.

In Trespass and Battery in London, if the Defendant justifie in Midd. by Process out of the Marshals Court, that he Arrested him, and because the Plaintiff would not go with him, he beat him, &c. Absque hoc that he is guilty in London vel alibi, out of the Jurisdiction of the Court. To which the Plaintiff replies, and acknowledges the Arrest, but says, that he beat him at London, de injuria sua propria absque tali causa, and issue upon this, This shall be tryed in London, and the Words absque tali causa, are void,

the iſſue being joyned upon a place certain, ſcil. London, affirmed in a Writ of Erroꝛ. Rolls ib. 624. But the Court ſaid, that he might have demurred upon this Plea.

De Corpore Comitatus.

If a Treſpaſs be alledged in D. and nul tiel Ville is pleaded, the Jury ſhall come de Corpore Comitatus. But if it be alledged in S. and D. and nul tiel Ville de D. is pleaded, the Jury ſhall come out de vicineto de S. foꝛ that is the moꝛe certain. So if a matter be alledged within a Manoꝛ, the Jury ſhall come de vicineto Manerii. But if the Manoꝛ be alledged within a Town, it ſhall come out of the Town, becauſe that is moſt certain, foꝛ the Manoꝛ may extend into divers Towns. And all theſe points were reſolved by all the Judges of England, upon Conference between them, in the Caſe of John Arundel Eſq; Indicted foꝛ the Death of William Parker.

Manor.

De Corpore Com.

Where there may be a ſpecial Viſne, the Tryal ſhall never be de Corpore Comitatus. Leon. 1 part. 109.

If a Venire facias ought to be of one oꝛ moꝛe Vills in certain, in a County, and this is awarded de Corpore Comitatus, This ſeems to be aided by the Statute of 21 Jac. of Jeofailes, foꝛ this comes from the Vills from whence it ought to come, and from others, in as much as it comes de Corpore Comitatus. Rolls tit. Tryal 618. And many other Caſes concerning this matter.

But in Ejectment of Land, called S. and no place is named where the Land lyes, and a Venire is awarded de Corpore Com.

this

this is erroneous, and too large, because there is a place certain where the Land lyes, and yet is not named in the Nar. as it ought to be. Hob. 121.

But if the Issue be taken upon a Title of Dignity, as whether Chivaler or not, this may come de Corpore Comitatus, because that the lieu lou, &c. is not material. ib.

If A. by the Name of A. of the County of Hampshire, bring a Scire facias upon a Recognisance in Chancery in the County of Midd. against B. And the Defendant plead that the Plaintiff is Outlawed by the Name of A. of the County of Chester, to which the Plaintiff replies, that he is not una & eadem persona, this may be by the Body of the County of Midd. where the Writ is brought. ibid.

In a Quare Impedit for the Church de Uselbee, and the Defendant pleads that there is no such Church, the Venue shall not come de Corpore Comitatus, but de vicineto de Uselbee, for this is a place known, and it is intended the Church of Uselbee is within the Ville of Uselbee. Hob. 325.

In a Prohibition, if the Parties be at Issue upon a Custom de non decimando of Wood in the Wild of Sussex, the Venire facias shall be de Corpore Comitatus, for the Wild is not such a place, whereof the Court may have conusance to be sufficient to have a Jury to come from this, for the Wild is a Wood by intendment. Hob. 348.

Wild.

Heir Tryed where the Land lies, where not.

In a real Action where the Demandant demands Lands in one County, as Heir to

his Father, and alledges his Birth in another County, if it be denyed that he is Heir, it shall not be Tryed where the Birth is alledged, but where the Land lyeth; for there the Law presumes it shall be best known who is Heir. But if the Defendant make himself Heir to a Woman (for that is the surer and more certain side, and the Mother is certain, when perhaps the Father is incertain) and therefore there it shall be tryed where the Birth is alledged, because they have more certain constance, than where the Land lyeth.

Cro. 3 part. 818. Cro. 2 part. 303.

Bastardy.

And so it is where Bastardy is alledged, the Tryal shall be in like Case, Mutatis mutandis.

Non Concessit where the Land lies.

If a Man plead the Kings Letters Patents, and the other party plead non concessit, it shall not be tryed where the Letters bear date, for they cannot be denyed, but where the Land lyeth.

Visne.

Every Tryal must come out of the Neighborhood of a Castle, Manor, Town or Hamlet, or place known out of a Castle, Manor, Town or Hamlet, as some Forest, and the like, as before.

Visne, Of what places.

Venire facias may be of a Forest, Burgo, Castro, Warda, Parco, &c. but not of a Leet, Baliva, Market, Walk, &c. nor de lieu conus, without alledging this to be out of a Hill or Parish. Siderfin 326. But after Verdict helped by the new Statute 16, 17 Car. 2. cap. 8.

Where the Writ is brought at Common-Law.

Every Plea concerning the person, Plaintiff, &c. shall be tryed where the Writ is brought.

When

When the matter alledged extendeth into a place at the Common Law, and a place within a Franchiſe, it ſhall be tryed at the Common Law. Co. Litt. 125. b.

Matters done beyond Sea may be tryed in England, and therefore a Bond made beyond Sea may be alledged to be made in any place in England, if it bear date in no place; but if there be a place, as at Burdeaux in France, then it ſhall be alledged to be made in quodam loco vocat. Burdeaux in France, in Iſlington in the County of Middleſex, and from thence ſhall come the Jury, 1 Inſt. 261. Lach. 4. and 5. So if the Tenant plead that the Demandant is an Alien, born under the Obedience of the French King, and out of the Legiance of the King of England; the Demandant may reply, that he was Born at ſuch a place in England, within the Kings Legiance, and hereupon a Jury of twelve Men ſhall be charged, and if they have ſufficient Evidence that he was Born in France, or in any other place out of the Realm, then ſhall they find that he was Born out of the Kings Legiance. And if they have ſufficient Evidence that he was Born in England, or Ireland, or Guernſey or Jerſey, or elſewhere within the Kings Obedience, they ſhall find that he was Born within the Kings Legiance. And this hath ever been the pleading and manner of Tryal in that Caſe. So of other things done beyond Sea, the adverſe Party may alledge them to be done at ſuch a place in England, from whence the Jury ſhall come, and in a ſpecial Verdict, they may find the things done beyond Sea. Ib. Lib. 7. 26.

(A)

Matters done beyond Sea, how tryable in *England*. *Vide cap.* 10.

Keeble 2 part. 315.

Alien.

Things done beyond Sea.

Lib. 7. 26.

So

Part without the Realm, and part within.

So when part of the act is done in England, and part out of the Realm, that part that is to be performed out of the Realm, if Issue be taken thereupon, shall be tryed here by twelve Men, and they shall come out of the place where the Writ or Action is brought. Ib. Lib. 6. 48.

Full age tryed where the Land lies.

Error, for that Judgment was given by default against the Defendant, being an Infant, Issue was taken that he was of full Age. And Godfrey moved, whether the Tryal should be in Norfolk where the Land was, or in Middlesex, where the Action was brought. And the Court held, that it should be tryed in the County where the Land lay; and Tanfield said, it was so adjudged in the Kings Bench, between Throgmorton and Burfind. Cro. 3. part. 818.

Where the Land doth lye.

Questions of Title of Land (except by special Order of the Judges in some Cases) are to be tryed in the County where the Land lies, for the Law is, that all real and mixt Actions, as Wast, Ejectment, &c. must be brought in the County where the Land is.

Tranſitory Actions.

But Debt, Detinue, Account, Actions of the Case, Battery, &c. are in their own nature transitory, and yet they ought to be laid and tryed in their proper County, where the Fact was done, unless the Court order the contrary, for some special Reasons; and if they are laid out of the proper County, dayly practice tells us the Court may alter the Venue, upon Affidavit of the true place of the Fact.

All

All Criminal matters are to be tryed where the offence is committed.

Criminal matters.

If the Venue arise in two Counties, the Jury upon two Venire facias shall come from both, six out of one County, and six from the other. Cro. 3. part. 646. But by consent of Parties, entred upon Record, it may be by five out of one, and seven from the other, as appears, Cro 3. part. 471. where in Replevin, the Defendant avows for Damage feasant, the Plaintiff by his Replication, claims common by Prescription in loco quo, &c. being Broadway in the County of Worcester, appurtenant to his Manor of D. in the County of Glouceſter, and issue thereupon, and two Venire facias awarded to the Sheriffs of the several Counties, and now seven of the County of Worcester appeared, and five of Glouceſter. And although there ought to have been six sworn of each County, to try that issue, as appears 49 Ed. 3. 1. 31 H. 8. 46. yet by the assent of Parties, those twelve who appeared, by advice of all the Justices, were sworn, and tryed the issue. And it was commanded that this Assent should be entred upon Record; for otherwise it would be a strange Precedent.

This is called a Joynder of Counties. *Finch* 410. Jury out of two Counties.

But out of more than two Counties it cannot be made.

An Assise of Common in Confinio Comitatus, and the issue be, whether he had Common by prescription in Land in one County, appendant to a Manor in another County, this shall be tryed by both Counties.

The same Law is in Trespass brought in one County (which cannot be in confinio) upon such an issue, the Tryal shall be

be per ambideux Counties. 49 E. 3. 20. See Rolls tit. Tryal 599. &c. Many Cases where the Jury shall come from two Counties.

(0.a) 1.

In an Action upon the Statute of Marlebridge, for taking a Distress in one County and chasing in another County, upon not guilty, the Tryal shall be only by the County where the chasing is, for this is all the cause of the Action. 4 H. 6. 4.

Escape.

(0.2) 8.

In Escape upon Arrest in one County, and an Escape in another County, upon not guilty this shall be tryed, where the Escape is laid, for the Action is upon the Escape. Rolls ib. 602.

(A.a)

Covenant in P. to sell at R. tryed at P.

In an Action of Trover, apud Paxton in Com. Hunt. the Defendant pleads a Bargain and Sale, apud Royston in Com. Hertford, in the Market there, whereby he after converted them, apud P. in Com. Hunt. The Plaintiff saith, that he was possessed of those Goods, apud P. in Com. Hunt. and that J. S. there stole them from him, and by Covenant betwixt him and the Defendant, at P. in Com. H. he sold them to the Defendant, as he hath pleaded: The Issue was upon the Sale made by Covenant, &c. And it was tryed in the County of Hunt. and found for the Plaintiff. And it was moved to be a mis-tryal; for it ought to have been by a Jury of the County of Hertford, or at leastwise by a Jury of both Counties: but it was adjudged to be well tryed because the Sale is confessed, and the Issue is upon the Covenant alledged in Hertford, Cro. 3. part. 511.

In

In Debt upon a Bond in London, the Defendant pleaded an Usurious Contract in the County of Warwick, the Plaintiff replyed, that the Bond was made upon good consideration, Absque hoc, that it was made for such Usurious Contract: the Tryal shall be in the County of Warwick; for the Bond is confessed, and the Usury in Warwick is only in question; so if the issue be whether the Deed were made by Dures, the Tryal shall be where the Dures, and not where the Deed is supposed to be made. Cro. 3. part. 195. Kinnersley v Smart.

Usurous Contract in another County.

A *Dures* shall be tryed there, not where the Action is brought.

Where Issue is taken upon a surrender, it shall be tryed where it was alledged to be done, and not where the Manor is, of which the Copy-hold is holden. ib. f. 260. Br. tit. Visne 114.

Surrender.

In an Assumpsit laid at London, in Warda de Cheap, the Venire was De Parochia de Arcubus in Warda de Cheap, whereas no Parish was mentioned before in the Count, and adjudged that the Venire was ill laid in the Count, for a Venire facias may be of a Town, Parish, Manor, or other place known, but not of a Hundred or Ward, ib. and so it is adjudged, ib. Cro. 1 part. 165. for the Ward in a City, is but as the Hundred in a County. The Parish in London is in lieu of a Hill and the Ward of a Hundred. Roll. tit. Tryal 620, 621, 622. vide hic apres.

Ward or Hundred, no good *Visne*.

Where the Visne is laid to be at a City, in an Action brought in a superior Court, or within the City, though it be both a City and County, the Venire facias may be de vicinet. Civitatis, Lach. 258. Though it hath been

City

been held not good, but that the Venire facias must be de Civitate, leaving out Vicinet. as you may read in Stamf. 155. But now the Case in Cro. 2 part. 308. and Bulstr. 1 part. 129. say, that all Venire facias's are awarded de vicinet. Civitatis, which is intended as well de Civitate it self, as de vicinet. infra Jurisdictionem of the City. And so it is, de vicinet. Civitatis, or de vicinet. or de Civitate Coventry, Eborum, Norwich, Sarum, Bristow, Exon, and all other Cities which are Counties in themselves. In all places besides London, no mention is made of the Parish or Ward. Ib. 493. But in London the Parish and Ward is mentioned. And therefore it was adjudged, Cro. 2 part. 150. That it was not good to alledge any thing done in London generally; but it must be in what Parish from which a Venire may be; but where a thing is laid in a City, in alta Warda there, and the Venire facias is from the City only, it is well, because it shall be intended there be no more Wards in the same City. Cro. 3 part. 282.

Rolls 622, 623.

So in all inferior Courts. Stiles 2. March 125.

London.

City.

Hundred.

In an Action against the Hundred upon the Statute of Winton, &c. upon the Roll the Venire facias is awarded of Bradley, quod est proximum Hundredum, and the Venire facias is generally of Bradley. This is well, because by the Roll it appears that Bradley and the Hundred were all one. Roll. tit Tryal 598.

If a thing be laid done, apud Bristol, viz. in Warda Sanctæ Mariæ in Warda de Ratliff, and the Venire facias is de Warda de Ratliff, this is not good. ib. 619.

But

But if it be alledged in a Ward in the City of Briſtol, &c. the Venue ſhall be of the Ward, not de Civitate.

A Venire facias was awarded from T. and not de vicinet de T. and for this cauſe reſolved to be ill, and not amendable. Cro. 2. part. 399. Bro. tit. Ven. fac. 8.

Ward.

If the Iſſue be, Si rex conceſſit per literas patentes, The Tryal ſhall be, as hath been ſaid, where the Land lies, and not where the Patent was made, becauſe the Patent is of Record; and if it be traverſed, it ſhall be tryed by the Record, and therefore the Iſſue being upon non conceſſit, the Iſſue is not upon the Patent; but where the Iſſue is upon non conceſſit, or non dimiſit, of a thing which paſſeth by Deed, the Tryal ſhall be where the Grant or Demiſe is alledged: but of a Feoffment, or Leaſe for Life pleaded, the Iſſue being non Feoffavit, or non dimiſit, Livery ought to be made, and therefore the Tryal ſhall be where the Land lies. Cro. 2 part. 376. 3 part 269.

De vicinet. left out, ill.

Where the Land lies.

Where the Offence is laid in the Count to be in one County, and the Juſtification in another County, and the Plaintiff replies, de injuria ſua propria, &c. The Viſne ſhall be where the Juſtification is alledged; as, one Example for all, to illuſtrate. In an Action upon the Caſe, for words ſuppoſed to be ſpoken at Bridge-North, in the County of Salop, the Defendant pleads, that he ſpake them as a Witneſs upon his Oath, upon an Iſſue tryed at Chard in the County of Somerſet. The Plaintiff replies, de ſon tort

Where the Action is laid in one County, and the Juſtification in another, the Tryal ſhall be where the Juſtification is.

tort demeſne, &c. And thereupon it was tryed by a Venire facias of Bridg-North, and Error thereof aſſigned, becauſe it ought to have bæn by a Viſne of Chard, where the Juſtification aroſe, and it was held clearly to be a miſ-tryal, and not aided by the Statute of Jeofailes, wherefore the Judgment was reverſed. Cro. 3 part. 468, 261, 870. More 410.

Replevin, taking two Horſes at ſuch a place in Denford in Com: Northampton, the Defendant makes Coniſans as Bayliff to the Lord Mountague of his Manor of S. which Manor is holden of the Honour of Glouceſter, and that the place in which, &c. is within the ſaid Honour, and alledges a Cuſtom within the ſaid Honour, on which Cuſtom the parties were at Iſſue, and the Venire facias was from Denford the place of taking, which was moved after Verdict, for that the Venue was not ſo large as the Iſſue, which was the Honour, and of this Opinion was the whole Court of C. B. Paſch. 13 Car. 2. Hull. verſ. Benning.

But the great Queſtion was, whence the Venue ſhould ariſe in this Caſe, and by Bridgman Chief Juſtice, and Juſtice Hide, in no Caſe can a Venue ariſe from an Honour; and the Chief Juſtice ſaid, he had cauſed the Prothonotaries to ſearch for Precedents, and they could not find that ever a Venue did ariſe from an Honour, which is but a bundle of ſervices, and an incorporeal thing, from which no Venue can come, and yet an Honour may have Demeſns, as the Honours of Graſton and Hampton have, but Glouceſter not.

Honours.

Sidersin 19. 88.

Chief

Chief Justice, and Justice Hide, seemed that the Venue should be de Corpore Comitat. Hob. 266. 249. But when the Court was after moved for their Opinion, they had them take a Venire facias at their peril, and would give no Opinion.

An Action of Debt was brought on a Bond to perform Covenants in an Indenture, whereby the Defendant had granted to the Plaintiff a walk called Shrob-walk, in the Forest of ..... in Com. Northampton, and Covenanted for peaceable enjoyment, &c. and he was ousted per Earl of Northampton, who had right, on which Right Issue was joyned, and the Venire facias was from Shrob-walk.

Per Cur. Its not good, for it appears by the Record that Shrob-walk is not a Hill: but if the Obligation had been laid to be made at Shrob-walk, the Venue should arise from thence, as a Hill. Inter Stirt and Bales, Pasch. 19 Car. 2. B. R.

The Venue shall follow and be according to the Issue. Out of what County.

As for words in Warwickshire, Thou art a Thief, and stolest my Iron: The Defendant justifies and says, the Plaintiff stole the Iron in Leicestershire, and brought it into Warwickshire, and therefore he spake the words in Warwickshire. If the Plaintiff replies, de injuria sua propria absque tali causa, the Jury shall come from Leicester-shire, to which the absque tali causa refers, for the words are acknowledged. See Rolls tit. Tryal 598. 623. *Vide hic ante & postea.* (m/a)3.

When part of the matter to be inquired of, is in one County or place, and part in another, the Tryal shall be there where the best Conusance of the matter may be.

(P.a.) 4. From the place best known.

As in an Action upon the Case; the Plaintiff declares that the Defendant took the Horse of A. at S. and sold him at D. to the Plaintiff as his proper Horse, and afterwards A. re-took the Horse. If the Defendant plead that the property was in him at the Sale, upon which Issue is joyned: The Venue shall be de S. where the taking is supposed, for there the property may be best known: which is only in question. 42 Ass. 8. See several Cases in Rolls ib. 603. under this Head.

(P.a.) 7. Where the Counties cannot joyn.

If the Issue be whether L. did ride from London to York, and from York to London five time in six days, this may be tryed by London only, although part of the matter to be inquired of was done in each County.

(P.a.) 8.

In an Action of Battery in London, if the Defendant justifies in defence of his possession in D. in Essex, and the Plaintiff says, Ne son tort demesn sans ciel cause, this ought to be tryed by both Counties if they might joyn, because he may be found guilty at another day, and therefore because they may not joyn, this may be tryed in Essex.

Of Assises in Continio Com. See 1 Inst. 154.

(P.a.) 9.

In Case for Words in one County, if the Defendant justifie in another County, and the Plaintiff reply de son tort demesn, &c. although the Counties ought to joyn, if they could, and the Justification is principally put

put in Issue, yet the Tryal may be in either County at the Election of the Plaintiff.

In Ejectment in London, upon a Lease made there of Land in Midd. if the Defendant plead not Guilty, this may be tryed in London, because the Counties cannot joyn, although the Jury ought to enquire of the Ejectment in Midd. and Judgment affirmed in a Writ of Error. See Rolls tit. Tryal 602. Rolls tit. Tryal 620. (P.a.) 10.

London cannot joyn with another County. 49 E. 3. 20.

Two Counties may joyn although they be not nearest, nay, though twenty Counties be between them. Finch French. 59. 1 Inst. 154. (H.a.)

But if it be of a Lease at Ickford of Land in Bury in Suffolk, the Venue must be of Bury, not of Ickford. 619. (H.b.2) 2a?

If the Issue be taken upon the name or condition of the person, this shall be tryed in the County where the Writ is brought, 21 E. 4. 8. for this may be well known there. Rolls ib. 615. (R.a.) 2.

Where the Writ is brought.

Where the Issue is to be tryed upon a point which shall be tryed by two Counties, and one cannot joyn with the other, this shall be tryed where the Writ is brought. 21 E. 4. 8. But for this, see before where the Counties cannot joyn. (P.a.) 14.

In Debt in London, against J. S. of D. in Essex, if the Defendant saith that he was at S. in Essex, at the time of purchasing the Writ, and not at D. this shall be tryed in Essex, and not where the Writ is brought, for none can know where he dwelt so well as the County of Essex. 12 H. 6. 5. (S.a.) 8.

Where in other County than where the Writ is brought.

Vide many Cases in Rolls ib. 605. &c. about this matter.

Where the escape was, and not where the Arrest was.

In an Action of the Case against a Sheriff, upon an Escape in London, and the Arrest laid to be in Southampton; adjuged, that the Visne shall be where the Escape was, because that is the ground of the Action, and not where the Arrest was. Cro 3 part. 271.

Deceit. Escape.

✓ Nota, In an Action of the Case for Deceit, or upon an Escape, the Court will not change the Visne out of the County where the Plaintiff suppoles the thing to be done. Siderfin 87.

Scandalum Magnatum.

✓ Nor in a Scandalum Magnatum, upon the common Affidavit. ib. 185.

Informations.

✓ Nor in Actions upon Penal Statutes, for they must be brought in their proper County. ib. 287.

Two Counties.

✓ Nor where the cause of Action is in two Counties, and the Plaintiff laid his Action in one of them. ib. 405.

✓ If the Plaintiff will be bound to give no Evidence but what arises in the County where he lays his Action, the Court will not change the Venue, upon the common Affidavit. ib. 442.

✓ Counsellor at Law, his Venue shall not be altered, because of his attendance at the Court. Modern Rep. 84.

In Debt upon an Obligation, payment was pleaded, apud domum mansionalem Rectoriæ de Much-Hadam, and the Venire facias was de vicineto de Much-Hadam, where it ought to have been de vicinet. Rectoriæ de Much-Hadam; but it was adjudged good, because

cause Much-Hadam is here intended a Will. 3 Cro. 804. So you see that where a thing is alledged to be done at the Capital House * of D. there the Venire shall be of D. for that is intended to be all one with the Will. But where it is at the Castle of Hertford, &c. there the Venire facias shall not be de vicineto de Hertford, but de Castro de Hertford, for Castrum Hertford is intended a distinct place by it self; and so of all Castles. Cro. 2 part. 239. More 862.

* Rectoriæ.

Castle.

Rolls tit. tryal 621.

A Venire facias may be awarded of a Castle. Rolls 618.

Where the Issue is not parcel of the Manor of D. or the custom of a Manor is in question, the Venire ought to be of the Manor. Hob. 284. Cro. 2 part. 327. If the Manor be laid to be in a Will, the Venire facias may be of the Manor in the Will, as de vicineto manerii de Stansted-Hall in Windham. Cro. 2 part. 405. More 581. Arundels Case, li. 6. 14.

Manor.

Rolls tit. Tryal 621.

The Venue cannot be of a Scite of a Manor. Rolls tit. Tryal 618.

In the Common-Bench, in Trespass, for taking away a Bag of Pepper. The Defendant justified as Servant of the Mayor and Comonalty of London, for Wharfage due to them by the Custom of London, which the Plaintiff refused to pay. The Plaintiff replyed that the Custom did not extend to him, because he was a Free-Man of the City, and ought not to pay Wharfage, to which the Defendant rejoyned, that the Custom extended to him, as well as to Strangers; upon which Issue was joyned.

London.

Recorder.

Resolved, 1. That the Issue should be tryed per Pais, not by the mouth of the Recorder, because he certifies nothing but what the Mayor and Aldermen direct, who are concerned in the Cause.

Where the Tryal shall be by the County next adjoyning.

2. That the Venire facias shall not be awarded to the Sheriffs of London, nor Middlesex, because the Tryals there are by Freemen. But it shall be to the County next adjoyning, viz. to the Sheriff of Surry. So where any City is concerned, the Venire facias shall not be directed to the Officers of the City, but to the County next adjoyning. Hob. 85. Stiles 137. More 871. vide hic cap. 2. See Hardres Reports, f. 309. Good Learning concerning this matter.

If the Issue concern the Mayor and Commonalty of a Town, the Array shall be made all of Forreigners. 31 Assise 19. vide Rolls tit. Tryal 597.

So if the Issue concern the Mayor and Commonalty, &c. although they are not Parties, yet the Venire facias shall be directed to the Sheriff of the next County. 15 E. 4. 18.

Information sur Seisure.

See Hardres Reports, f. 16. &c. Good matter in an Information upon a seizure in what place the Visne shall be, and the entry and manner of quashing one Venire facias, and awarding a Venire facias de novo, &c.

Where a Man lends his Horse in one place, and he is spoiled in another, *Visne* where he is spoyled.

Where a Man lends a Horse to another to till his Land, and the Horse dies with excessive Labour, the Visne shall be from the place where the excessive Labour was, and not where the delivery was. More 887. vide

vide Hob. 188. Rolls tit. Tryal 615. Paſch. 22 Car. 2. B. R. Horſley verſus Potter. An Action of the Caſe was brought for miſuſing a Horſe, in Itinere; the Contract was laid at Swafham in Norfolk, and the riding to Peterborough in Northamptonſhire, where the Horſe dyed, it was tryed in Norfolk; and the Court ſeemed that it ought to have been tryed in Northamptonſhire where the damage was done, and not where the Contract was made, but it was aided by the Statute of Jeofailes, 17 Car. 2. cap. 17. (after Verdict) that Statute being then in force.

Promiſe in one place and breach in another. *Viſne* guided by the Iſſue.

Where a promiſe is laid in one place, and the breach in another, the Viſne muſt be according to the event of the Iſſue, whether it be taken upon the promiſe or breach. But if no place be alledged for the breach, and Iſſue be taken upon it, the Viſne muſt be from the place of the promiſe, which ſhall be intended right, where the contrary appears not, ſee Godbolt. 274.

Modern Rep: 36, 37.

✓Eaſter 39 Eliz. In the Kings-Bench, Treſpaſs, Aſſault and Battery, en Wilts, continuing the Aſſault in Middleſex, and adjudged that the Jurors ſhall come out of both Counties. More 538.

Miſnomer.

✓The name of a Manor, or Land, or other local thing ſhall be tryed where it lyes, becauſe it is local; but the name or addition of a perſon, ſhall be tryed where the Action is brought, becauſe this is tranſitory. Bro. tit. Viſne 7. lib. 6. 65.

Where the Land lies.

In Covenant upon an Indenture of Demise of the Rectory of Stoken-Church in the County of Oxford, That the Defendant had good Power and Authority to demise: The Indenture was alledged to be made at London, and the Venire facias was awarded to the Sheriff of Oxon, and this being assigned for Error, Judgment was affirmed, and this adjudged to be good. More 710. Because the Rectory was in Comitat. Oxon. vide page 45.

Where the Land lies, and not where the Writ, &c.

In Debt upon an Obligation in one County to perform Covenants in a Lease, and the Land and payments were in another County; the Tryal shall be where the Land and payments are. 44 E. 3 42.

In Debt upon a Lease in one County, and the payment of the Rent upon the Lease limitted there also, but the Land was in another County, and the payment upon the Land; this shall be tryed where the Land and payment was, for he was bound to pay this there upon the Distress. ib.

But the Tryal should have been where the Writ was brought, if the payment had not been alledged to be where the Land was. ibid.

Where the Land and Writ. &c.

If Debt be brought for Rent upon a Lease for years, and the Action is brought where the Land is, but the Deed of the Lease bears date in another County, the Tryal shall be where the Land and Writ is brought. 45 E. 3. 8. The Issue being whether the Lessor had a conditional Estate or not, and so a lawful eviction.

If

If the Iſſue be in an Aſſiſe, whether the Tenant be the eldeſt Son of J. S. and his birth is alledged in another County, yet this ſhall be tryed where the Land is. 46 Aſſ. 5.

Where the Land lies, and where not.

If an Infant bring an Aſſiſe, and a Releaſe of his Anceſtor is pleaded againſt him, dated in another County, this muſt be tryed where the Releaſe is dated, and not by the Aſſiſe, although the Plaintiff be an Infant, and the circumſtances are to be enquired. 21 E. 3. 20. See Rolls ib. 611.

In Caſe if the Plaintiff declare upon a Truſt at D. and of a Wrong at S. upon not guilty, if it appear the Truſt is not materiall, the Venue ſhall only come from S. and not from both places, one not being material.

Where from two places in one County, and where not. *Vide hic.* cap. 10.

In caſe for ſtopping a way from ſuch a place, to ſuch a place, and that the obſtruction was at D. Upon not guilty, the Venue ſhall not come from D. only, for all the way is put in Iſſue.

If the Nar. be apud A. in Com. B. and the Venire is de Vill. & Paroch. de A. 'tis ill. Yelv. 104. 2 Cro. 586.

The *Venire* as large as the *Nar.* and no larger.

When the Venue ſhall be from two Vills, 2 Cro. 599. Yelv. 26, 182, 187.

Venire from two Vills.

In Treſpaſs in one Vill, and a Releaſe pleaded in another Vill, within the ſame County, upon non eſt factum, this ſhall be tryed per ambideux. Rolls ib. 624. vide hic ante. See Rolls ib. 615. many Caſes about this.

Where the Venue cannot be from a Vill, Hamlet or lieu conus, there it may be de Corpore Comitatus, for if it might not be ſo, the Cauſe could not be tryed.

De Corpore Com.

(F. 6)

A lieu conus is a Castle, Mano⁹ o⁹ other notorious place well known, and generally taken notice of by those who dwell about it, and not a Close o⁹ Pasture of Ground, o⁹ such like place of no repute.

(D. 8)

A Custom of a County is to be tryed de Corpore Comitatus, fo⁹ the Custom runs th⁹ough the whole County.

Parish.

VT(G. B) 12.

Where the Parish is named by way of denotation, o⁹ explanation of the place, where the Fact is alledged to be done, as at the Parish-Church of Hauck-hucknol, there the Venire facias shall be of the Town, not of the Parish. Bulstr. 1 part, 60, 61.

Town.

If the Fact be alledged in King-street, in the Parish of St. Margarets in Com. Midd. You have already heard that the Visne shall be from King-street, because it is intended to be a Town; but where it is alledged to be done at Grays-Inn-Hall, o⁹ Lincolns-Inn-Hall, &c. in Holborn, the Visne shall be from Holborn, which is the Town; fo⁹ as Yelverton said, it was never heard of any Venire facias to be had of any of the Inns of Court, Bulstr. 2. part 120. especially of the Hall, because it cannot be of a House, much less of a Hall.

(F. B)

Inns of Court.

Not from House or Hall.

VT(G. B) 12.

In Ejectment upon a Demise made at Denham of Lands in Parochia de Denham prædict. The Visne may be of Denham o⁹ of the Parish of Denham, because Denham and Parochia de Denham prædict. are all one by intendment of Law. Bulstr. 2 part 209. More 709. Hob. 6. But when it appears by the Record, o⁹ is intended that the Parish is mo⁹e spacious than the Town, as the Case

Parish.

case in More 837. where in Ejectment the Lease was alledged to be made at Bredon of Tythes in W. and W. Hamlets within the Parish of Bredon, there the Venire facias must not be of Bredon, but of the Parish, because it appears, that the Parish extends further than the Town. Hob. 326.

For Rent where the Land lies, and when not.

Where an Action of Debt for Rent, is brought upon the privity of the Contract, by the Lessor, as against the Lessee, or his Executors, for Arrearages due in the life-time of the Testator, the Visne may be laid in any place; but where the Action is brought upon the privity in Estate, as against the Assignée of the Lessee, or his Executors, for Rent due after the Testators death, the Visne must be where the Lands lye. Lach. mis-printed, 197, 262, 271. v. li. 3. 24.

And so it was adjudged in the Case of Hall and Arnold, Mich. 1656. B. R. And it was farther adjudged there, the Case being of a Lease made at London, of Lands in Monmouth-shire, rendring Rent payable at the Old Exchange, for which an Action is brought by the Heir. If there had been no place of payment, the Heir must have brought his Action where his Lands lye, but the place of payment being in another County, he has his Election, as on a Lease for Years of Lands in two Counties.

Debt for rent of Land in another County.

Walkers Case, in Debt upon a Lease of Land in another County, Nihil debet shall be tryed where the Action is brought. Bro. tit. Visne 119. vide pag. 93.

In

In Replevin brought by Strede against Hartly, for taking a Distress at Baildon, the Defendant made Conusance as Bayliff, because that locus in quo, &c. was holden of W. H. as of his Manor of Baildon, and upon Issue, hors de son fee, the Venire facias was de vicineto de Baildon; and upon motion that the Venire facias ought to have been, as well from the Manor as the Town, the Court adjudged it to be well enough, for that the Court shall not intend the Manor was larger than the Town, because it doth not appear so to be, though possibly it might, as like the Case of Town and Parish. Hob. 305, 326.

Manor.

Visne next adjoyning, in what Cases.

If the Sheriff return that there are no Free-holders of that Visne, or if the Visne be where the Kings Writ runs not, as in the Cinque Ports, &c. or in a place where the Men are privileged from serving on Juries out of that place, as the Isle of Ely, &c. the Plaintiff may pray a Venire facias of the Visne next adjoyning, and if the Visne be in Wales (ou briefe le Roy ne court) the Venire facias shall be directed to the Sheriff of the next English County, to cause the Jury to come de propinquiori Visne of his County, to the Visne in Wales adjoyning: for the Court shall not be ousted of the Plea. Fitz. Abridg. tit. Visne 8. Jurisdict. 24.

Cinque Ports.

Wales.

In an Action against a Hundred the Venire facias may come from the next Hundred generally.

In

In Treſpaſs, if the Defendant plead not Guilty to part, and to the reſidue a Plea, which cauſes the Tryal of that to be by a Jury de Prochein Hundred, The Venire ſhall be awarded al Prochein Hundred for both Iſſues, becauſe there ought not to be two Venire facias in one Action. Vide Rolls tit. Tryal 596. pl. 4.

In an Appeal of Murder committed in the Cinque Ports, although the King be concerned, yet becauſe this is betwixt common perſons, the Venire facias ſhall be to the next adjoyning Vill. Ibid. pl. 6.

120.

If the Iſſue be joyned of matter in Ireland, this ſhall be tryed by a Jury of the next County in England, ib. pl. 8

Ireland.

If the Iſſue be to be tryed by the Venue of a Manor, and the Plaintiff ſuggeſts that he is Lord of the Hundred in which the Manor is, and that all within the Hundred are within his Diſtrels, if the Defendant acknowledge this, the Venue ſhall not be de Corpore Comitatus, but of the next Hundred, for if it ſhould be de Corpore Comitatus, this ſhould be tryed by the Tenants of the Manor. Rolls ib. 667.

Prochein Hundred.

If the Viſne is in ſome part miſ-awarded, or ſued out of more places or fewer than it ought to be, ſo as ſome place be right named, this is aided by the Statute of Jeofailes, which hath ended the differences in many Cales Reported in our Books, concerning this Point; wherefore I purpoſely omit them.

Viſne miſ-awarded in part.

Error,

Infancy where the Land lies.

Error, for that the Judgment was given by default against the Defendant, being an Infant, upon Issue that he was of full Age, adjudged, that the Tryal should be in Norfolk where the Land was, and not in Middlesex, where the Action was brought. Cro. 3 part 818.

May be out of a wrong place by consent.

If the Visne cometh from a wrong place, yet if it be per assensum partium, and so entred of Record it shall stand; for Omnis Consensus tollit errorem. 1 Inst. 125.

Where the Issue is local the Visne cannot be changed by consent. Siderfin 339.

Holmes versus Sanders, Hill. 22, 23 Car. B.R. Error to reverse a Judgment given in the Kings-Bench in Ireland, in Debt for Rent brought by the Assignees of a Reversion the Plaintiff declared of a Lease of Land in such a Parish in the Suburbs of Dublin, on nil debet pleaded, the Venire facias was from the said Parish, in Civitate Dublin, and Judgment there pur Plaintiff; it was assigned for Error, because the Land lies in the Suburbs of the City, and the Venire facias was from a Parish in the City. 121.

Per Cur. It is all one, for the Suburbs are always within the Franchise of the City, as Fleet-street is within the Suburbs of London, but the Strand not, though so reputed.

Note, it was adjudged Error in an Inferior Court, that the Venire facias was awarded secundum consuetudinem Curiæ, which ought to be per Curiam. Reader vers. Moor, Mich. 1650. B. R.

By

By the Statute of 16 and 17 Car. 2. After Verdict, Judgment shall not be stayed or reversed, for that there is no right Venue, so as the cause were tryed by a Jury of the proper County or place where the Action is laid. This Act doth not extend to Appeals, Indictments of Felony, &c. nor to Actions upon penal Statutes, other than concerning Customs and Subsidies, &c.

CAP. IX.

Challenges.

YOU have already seen of what Visne the Jury ought to be: The next thing to be considered is concerning Challenges.

Challenge is a Word common as well to the English as to the French, and sometimes signifieth to claim, and the Latin Word is Vendicare; sometimes in respect of revenge, to challenge into the Field, and then it is called in Latin vindicare, or provocare; sometimes in respect of partiality or insufficiency, to challenge in Court persons returned on a Jury. And seeing there is no proper Latin Word to signifie this particular kind of challenge, they have framed a Word anciently written Chalumniare, and Columpniare, and Calumpniare, and now written Calumniare, and hath no affinity with the Verb Calumnior, or Calumnia, which is derived of that, for that is of a quite other sense; Challenge.

Calumniator.

sense, signifying a false Accuser, and in that sense Bracton useth Calumniator, to be a false Accuser: but is derived of the old Word Caloir or Chaloir, which in one signification is to care for or foresee. And for that to challenge Jurors, is the mean to care for or foresee that an indifferent Tryal be had, it is called Calumniare, to challenge, that is to except against them that are returned to be Jurors, and this is its proper signification: but sometimes a Summons Summonitio is said to be Calumniata, and a Count to be challenged, but this is improperly. And forasmuch as Pens Lives, Fames, Lands and Goods, are to be tryed by Jurors, it is most necessary that they be Omni exceptione majores, and therefore I will handle this matter more largely.

Challenge is twofold.

A Challenge to Jurors is two-fold, either to the Array, or to the Polls: to the Array of the principal Pannel, and to the Array of the Tales. And herein you shall understand that the Jurors Names are ranked in the Pannel, one under another, which order or ranking the Jury, is called the Array, and the Verb, to Array the Jury, and so we say in common speech, Battail Array, for the order of the Battail. And this Array we call Arraimentum, and to make the Array, Arraiare, derived of the French word Arroier; so as to challenge the Array of the Pannel is at once to challenge or except against all the Persons so arrayed or impannelled, in respect of the partiality or default of the Sheriff, Coroner, or other Officer that made the Return.

To the Array.

Array.

And

And it is to be known, that there is a principal cause of Challenge to the Array and a Challenge to the Favour; principal in respect of partiality, as first, If the Sheriff or other Officers be of Kindred or Affinity to the Plaintiff or Defendant, if the Affinity continue. Secondly, If any one or more of the Jury be returned at the denomination of the Party, Plaintiff or Defendant, the whole Array shall be quashed. So it is if the Sheriff return any one, that he be more favourable to the one than to the other, all the Array shall be quashed. Thirdly, If the Plaintiff or Defendant have an Action of Battery against the Sheriff, or the Sheriff against either Party, this is a good cause of challenge. So if the Plaintiff or Defendant have an Action of Debt against the Sheriff (but otherwise it is, if the Sheriff have an Action of Debt against either Party) or if the Sheriff have parcel of the Land depending upon the same Title, or if the Sheriff or his Bailiff which returned the Jury, be under the distress of either Party; or if the Sheriff or his Bailiff be either of Counsel, Attorny, Officer in Fee, or of Robes, or Servant of either Party, Gossip, or Arbitrator in the same Matter, and treated thereof. And where a Subject may challenge the Array for unindifferency, there the King being a Party, may also challenge for the same Cause, as for Kindred, or that he hath part of the Land, or the like; and where the Array shall be challenged against the King, you shall read in our Books. Principal Challenges.

In Ejectment, the Plaintiff suggesteth that his Lessor, the Sheriff and Coroners were Tenants to a Dean and Chapter, whose Interest was concerned, and prayed the Venire facias to Elisors, and had it, being confessed by the Defendant, and the Court took it a principal Challenge, vide Hut. 24. Moor 470. Rolls Rep. 328. Duncomb and Ingleby, Trin. 15 Car. 2. B. R.

A Prayer to Elisors in Tryals at Bar may be at the Suit of the Defendant or Plaintiff but in Nisi prius at the prayer of the Plaintiff only, and per Cur. it is a principal Challenge that the Plaintiffs Lessor is Sheriff or Kinsman, and if the Plaintiff doth not pray, &c. the Defendant may challenge the Array at the Assises, Lord Brookes Case, Trin. 1657. B. R.

'Tis a good Challenge to the Array, that the Array is made and returned by two Coroners only, when there are four in the County, and that the Writ is returned by one of the Sheriffs of London only. So if a Bailiff return them that are out of his Franchise, or if an Array be to be of Persons out of a Franchise and Guildable, and the Bailiff return them, for the Sheriff ought to make it; and that some of the Pannel were returned by the Bailiff of a Franchise, where the whole Pannel is returned as Array by the Sheriff, this is a good Challenge to the Array, for otherwise the Parties would lose their Challenge to the Array made by the Bailiff, Rolls Tit. Tryal 636.

If

If the Defendant ſue the Writ of Hab. Corpus by Proviſo at the return, the Plaintiff may Challenge the Array for Kindred between the Defendant and the Sheriff, D. 15 El. 319. 13. By what Perſon.

D. 15 El. 319. The Array was quaſhed although the Sheriff was the Neuſe in deſcent, and the Tenant in the 7 deſcent from the Anceſtor of whom both deſcended, Couſin to the Parties Wife, although herſelf no Party. So if the Wife be dead, if Iſſue be alive. Theſe are good Challenges to the Array. What Conſanguinity is ſufficient.

Alliance to one Party is a good Challenge. For Affinity.

If the Sheriff be allied at the making of the Pannel, and be dead at the Challenge, yet this is a good Challenge. 'Tis no Challenge that the Sheriff became of Kin after making the Pannel. At what time.

'Tis no Challenge to the Array if all the Jurors be of Affinity.

It may be after a Tales prayed, for no Challenge can be until the Jury is full. If the ſuggeſtion of Couſinage to have the Venire facias to the Coroners be denied, and the Venire facias is awarded to the Sheriff, the ſame Challenge ſhall not be allowed to the Array, but any other Cauſe may be alledged, than what was before denied.

Favourably made by the Sheriff or his Bailiff, or the Bailiff of a Franchiſe, is a good Challenge. That the Sheriff is within the Diſtreſs of a Party, or Servant to the Plaintiff, of the Robes of the Plaintiff, was Arbitrator for a Party, is Procura- For favour.

tor and Maintainer of a Party, That the Sheriff purchased part of the Land in question, That the Pannel was made by the Bailiff of the Franchise of the other Party. These are good Challenges to the Array.

'Tis no principal Challenge that one Party is Tenant, or Servant to the Sheriff, but it is a good Challenge for Favour.

Denomination

It is a good Challenge to the Array, That the Sheriff made the Array, or put a Juror into the Pannel at the denomination of any of the Parties in favour to them, or of their Servants, or of one interessed, or of a Maintainer, or of the Counsel, or of a Procurator.

Not if Strangers by the Sheriffs leave make the Pannel, or it be made at the request of both Parties.

For Malice.

'Tis a good Challenge to the Array, that one of the Parties has brought an Action of Debt against the Officer that returns the Pannel, or that there is a difference betwixt the Officer and the Party, that the Officer killed his Servant.

But not that the Officer has Debt against the Party, for he may demand his Debt without Malice.

How and in what manner the Challenge is to be made.

The Challenge ought to be quod tempore Pannelli præd. Arraiati, the Sheriff was Cousin to the Wife of the Defendant, &c. not afterwards, nor before, unless you aver that she was alive or had issue at the making the Pannel.

If

If the Challenge be taken for Cousinage, it ought to be shewn coment Cousion, but in such a Challenge to be a Juror 'tis not necessary to shew coment Cousin.

The manner and conveiance of the Cousinage alledged in a Challenge is not traversable. You may traverse the Cousinage prout without modo & forma. If the Challenge be that the Sheriff was Cousin to the Plaintiff, or within his distress; 'tis no Counterplea to say he is likewise of kin to the Defendant, or within his distress also. What Counterplea of a Challenge is good and how to be pleaded.

Where the King is Party to the Issue, no Challenge shall be to the Array for favour, 38 Ass. 19. Where the King is Party.

Otherwise if the Sheriff be Vadelet of the Kings Crown, or such menial Servant.

If it be presented that J. S. hath made a Nusance to London and le gents, 'tis no Challenge to the Array, to say the Sheriff of Middlesex is deputed and removable by the Commonalty of London, because this is the Suit of the King.

The King may make his Challenge that the Sheriff is within the Parties distress, although every Subject owes greater favour and obedience to the King, by reason of his Allegiance, than to any Lord by reason of Tenure.

In a Writ of Right, or any other Writ, a Baron of the Realm may excuse himself. What Persons may be Impannelled.

In a Writ of Right the Inquest ought to be all Knights. A Banneret may be impannelled in this Writ; so may a Serjeant, if there be not Chivalers covenable.

In an Attaint upon a Recovery by false Verdict in an Assise, some Knights ought to be returned, and if there be not any in the Hundred where the Land lies, they shall be returned out of the County.

By default of the Sheriff, as when the Array of a Pannel is returned by a Bailiff of a Franchise, and the Sheriff return it as of himself, this shall be quashed, because the Party shall lose his Challenges. But if a Sheriff return a Jury within a Liberty, this is good, and the Lord of the Franchise is driven to his remedy against him.

Where there must be a Knight returned of the Jury.

If a Peer of the Realm, or Lord of Parliament be Demandant or Plaintiff, Tenant or Defendant, there must a Knight be returned of his Jury, be he Lord Spiritual, or Temporal, or else the Array may be quashed: but if he be returned, although he appear not, yet the Jury may be taken of the residue. And if others be joyned with the Lord of Parliament, yet if there be no Knight returned, the Array shall be quashed against all. So in an Attaint, there ought to be a Knight returned to the Jury.

Note, This Challenge may be taken by the Peer, but not by the other Party, who is not a Peer, for it is only the Priviledge of a Peer, *Modern* Reports 226.

If two Peers sue as Gentlemen, and admit themselves so in pleading; 'tis no Challenge

lenge to say, no Knight is returned; for the Sheriff is in no fault.

And when the King is Party, as in Traverse of an Office, he that traverseth may challenge the Array, as hereafter in this Section shall appear; and so it is in case of Life: And likewise the King may challenge the Array, and this shall be tryed by Tryors according to the usual course. The Array challenged on both sides shall be quashed. Where the King is Party.

And if two Estrangers make a Pannel, and not in favourable manner for the one Party or the other, and the Sheriff returns the same, the Array was challenged for this cause, and adjudged good. (F.N.B.)

If the Bailiff of a Liberty return any out of his Franchise, the Array shall be quashed, as an Array returned by one that hath no Franchise shall be quashed. (F.N.B.)

Challenge to the Array for Favour: He that taketh this, must shew in certain the Name of him that made it, and in whose time, and all in certainty: This kind of Challenge being no principal Challenge, must be left to the Discretion and Conscience of the Triors; as if the Plaintiff or Defendant be Tenant to the Sheriff, this is no principal Challenge, for the Lord is in no danger of his Tenant, but e converso it is a principal Challenge; but in the other he may Challenge for Favour, and leave it to Tryal. So Affinity between the Son of the Sheriff, and the Daughter of the Party, or e converso, or the like, is no principal Challenge, but to the Favour; but if the Sheriff Challenge to the Favour. (M.c) (I.c.3.) 13.14. (I.c.) 2.3.

Marry the Daughter of either Party, or e converſo, this (as hath been ſaid) is a principal Challenge, or the like. But where the King is Party, one ſhall not challenge the Array for Favour, &c. becauſe in reſpect of his Allegiance, he ought to favour the King more. But if the Sheriff be a Vadelect of the Crown, or other menial Servant of the King, there the Challenge is good; and likewiſe the King may Challenge the Array for Favour.

For the King.

To the Array. Note, Upon that which hath been ſaid it appeareth, that the Challenge to the Array, is in reſpect of the cauſe of unindifferency, or default of the Sheriff or other Officer that made the Return, and not in reſpect of the Perſons returned, where there is no unindifference or default in the Sheriff, &c. for if the Challenge to the Array be found againſt the Party that takes it, yet he ſhall have his particular Challenge to the Polls.

To the Polls. In ſome Caſes a Challenge may be had to the Polls, and in ſome Caſes not at all. Challenge to the Polls, is a Challenge to the particular Perſons, and theſe be of four kinds, that it is ſay, Peremptory, Principal, which induce Favour, and for default of Hundredors.

Peremptory Challenge. Peremptory, this is ſo called, becauſe he may challenge peremptorily upon his own diſlike, without ſhewing of any cauſe, and this only is in caſe of Treaſon or Felony, in favorem vitæ; and by the Common Law, the Priſoner upon an Indictment or Appeal, might challenge thirty five, which was under

under the number of three Juries; but now by the Stat. of 22 H.8. the number is reduced to 20 in Petite Treason, Murder and Felony; and in Case of High Treason, and Misprision of High Treason, it was taken away by the Stat. of 33 H.8. But now by the Stat. of 1 & 2 Phil. & Mary, the Common Law is revived for any Treason, the Prisoner shall have his Challenge to the number of 35, and so it hath been resolved by the Justices, upon conference betwæn them in the case of Sir Walter Raleigh and George Brooks: But all this is to be understood when any Subject that is not a Pær of the Realm is arraigned for Treason or Felony. But if he be a Lord of Parliament, and a Pær of the Realm, and is to be tryed by his Pærs, he shall not challenge any of his Pærs at all, for they are not sworn as other Jurors be, but find the Party guilty or not guilty, upon their Faith or Allegiance to the King, and they are Judges of the Fact, and every of them doth separately give his judgment, beginning at the lowest. But a Subject under the Degree of Nobility, may in case of Treason or Felony, challenge for just cause as many as he can, as shall be said hereafter. In an Appeal of Death, against divers, they plead not guilty, and one joynt Venire facias is awarded, if one challenge peremptorily, he shall be drawn against all. Otherwise it is of several Venire fac.

No Challenge of Peers.

Note, That at the Common Law, before the Stat. of 33 E. 1. the King might have challenged peremptorily without shewing cause, but only that they were not good for the

The Kings Challenge restrained.

the King, and without being limited to any number, but this was mischievous to the Subject, tending to infinite delays and danger. And therefore it is enacted, Quod de cætero licet pro Domino Rege dicatur quod juratores, &c. non sunt boni pro Rege: non propter hoc remaneant inquisitiones, &c. sed assignent certam causam calumniæ suæ, &c. whereby the King is now restrained.

Principal Challenge to the Polls.

Principal, so called, because if it be found true, it standeth sufficient of it self without leaving any thing to the Conscience or Discretion of the Triors. Of a principal cause of Challenge to the Array, we have said somewhat already; now it followeth with like brevity, to speak of principal Challenges to the Polls, (that is) severally to the Persons returned.

(A. 2 4) 1.

A principal Challenge is nothing else but such Matter which proves evident Favour, or enmity in the Juror; and therefore it belongeth to the Justices to draw the Juror, and not to leave the decision to Triors, 21 E. 4. 11.

To the Polls.

Principal Challenges to the Poll may be reduced to four Heads. First, Propter honoris respectum, for respect of Honour. Secondly, Propter Defectum, for Want or Default. Thirdly, Propter Affectum, for Affection or Partiality. Fourthly, Propter Delictum, for Crime or Delict.

Principal Challenges to the Polls.

First, Propter Honoris respectum, As any Peer of the Realm, or Lord of Parliament, as a Baron, Viscount, Earl, Marquess and Duke, for these in respect of Honour and

and Nobility, are not to be ſworn on Juries; and if neither Party will challenge him, he may challenge himſelf; for by Magna Charta it is provided, Quod nec ſuper eum ibimus nec ſuper eum mittemus niſi per legale judicium parium ſuorum, aut per legem terræ. Now the Common Law hath divided all the Subjects into Lords of Parliament, and into the Commons of the Realm. The Peers of the Realm are divided into Barons, Viſcounts, Earls, Marqueſſes and Dukes; The Commons are divided into Knights, Eſquires, Gentlemen, Citizens, Yeomen and Burgeſſes: And in Judgment of Law, any of the ſaid Degrées of Nobility are Peers to another: As if an Earl, Marquels or Duke, be to be tryed for Treaſon or Felony; a Baron, or any other Degrée of Nobility is his Peer. In like manner a Knight, Eſquire, &c. ſhall be tryed per Pares, and that is by any of the Commons, as Gentlemen, Citizens, Yeomen or Burgeſſes; ſo as when any of the Commons is to have a Tryal, either at the Kings Suit, or between Party and Party, a Peer of the Realm ſhall not be impanneled in any Caſe.

Propter honoris reſpectum.

A Peer may challenge himſelf.

Peers and Commons.

Secondly, Propter defectum.

1. Patriæ, As Aliens Born.

2. Libertatis, As Villains or Bondmen, and ſo a Champion muſt be a Freeman.

3. Annui cenſus, i. e. liberi tenementi.

Challenge, *Propter defect'.*

Firſt, What yearly Freehold a Juror ought to have, that palleth upon Tryal of the Life of a Man, or in a Plea real, or in a Plea perſonal,

See before, *cap.* 7.

Quorum quilibet habeat 4 l. &c.

perſonal, where the Debt or Damage in the Declaration, amounteth to forty Marks, Vide Littleton, Sect. 464. Secondly, this Free-hold muſt be in his own Right, in Fee-ſimple, Fee-tayl, for term of his own Life, or for another Man's Life, although it be upon condition, or in the right of his Wife, out of ancient Demeſn; for Free-hold within ancient Demeſn will not ſerve: but if the Debt or Damage amounteth not to forty Marks, any Free-hold ſufficeth. Thirdly, he muſt have Free-hold in that County where the cauſe of the Action ariſeth, and though he hath in another it ſufficeth not. Fourthly, if after his return he ſelleth away his Land, or if Ceſtui que vie, or his Wife dyeth, or an entry be made for the condition broken, ſo as his Free-hold be determined, he may be challenged for inſufficiency of Freehold.

In Caſes of Treaſon and Felony, at common Law, want of Freehold was no cauſe of challenge; probos & legales homines, was ſufficient. The Statute of 2 H. 5. is gone as to that by the Statute 1 and 2 of Queen Mary. See the Lord Ruſſels Tryal. July 13. 1683.

It ſeems before the Statute 2 H. 5. in Actions where the Freehold was concerned, the Jurors ought to have ſome Free-hold. 3 H. 4. 4. By that Statute in all Pleas real and perſonal, where the Debt or Damage, or both together amount to forty Marks, the Juror muſt have forty Shillings Free-hold. In an Attaint they muſt be able

able to expend twenty pounds per annum. Rolls tit. Tryals f. 648.

In an Accompt upon the receipt of one hundred Shillings, if he count to his Damage two hundred Shillings, if the Juror hath but twenty Shillings, or under forty Shillings, 'tis sufficient, because he shall not recover Damages, and so this is not within the Statute 10 H. 6. 18. for the sufficiency of Jurors. See Rolls tit. Tryal 648.

A Man seised of the Manor of Dale, enfeoffs a Stranger upon condition to pay yearly to J. S. and his Heirs forty Shillings Rent. J. S. dyes seised of this Rent, and then his Heir takes it, yet the Heir hath not sufficient Freehold.

Land to the value of forty Shillings is given to the Husband and Wife, and the Heirs of their two Bodies begotten, who have Issue a Son, the Husband gives the Land by Fine to an Estranger and his Heirs, and dyes, the Wife enters and dyes seised, the Son hath not sufficient Freehold to be a Juror.

A Man seised of Land to the value of forty Shillings within the County of Midlesex, and of Land to the value of twelve within the County of Sussex, and grants a Rentcharge of forty Shillings, issuing out of all the said Land to a Stranger, in Fee, the Grantee hath sufficient Free-hold to be a Juror in both Counties. See many speculative Cases upon this subject, in Williams his Reading upon the Statute 35 H. 8. cap. 6.

4. Hun-

E. 2. 20. Co. Litt. 157. a.

Challenges *propter defectum hundredorum.*

4. Hundredorum: First, by the common Law in a Plea real, mixt and personal, there ought to be four of the Hundred (where the cause of Action ariseth) returned for their better notice of the cause; for Vicini vicinorum facta præsumuntur scire. And now since Littleton wrote, in a Plea personal, if two Hundredors appear, it sufficeth; and in an Attaint, although the Jury is double, yet the Hundredors are not double. Secondly, if he hath either Free-hold in the Hundred, though it be to the value but of half an Acre, or if he dwell there, though he hath no Freehold in it, it sufficeth. Thirdly, if the cause of the Action riseth in divers Hundreds, yet the number shall suffice as if it had come out of one, and not several Hundredors out of each Hundred. Fourthly, if there be divers Hundreds within one Leet or Rape, if he hath any Freehold, or dwell in any of those Hundreds, though not in the proper Hundred, it sufficeth. Fifthly, if the Jury come de Corpore Comitatus, or de proximo Hundredo, where one party is Lord of the Hundred, or the like, there need no Hundredors be returned at all. Sixthly, if a Hundredor after he be returned, sell away his Land within that Hundred, yet shall he not be challenged for the Hundred, for that his notice remains; otherwise as hath been said for his insufficiency of Freehold, for his fear to offend, and to have Lands wasted, &c. which is one of the Reasons of Law is taken away. Seventhly, he that challengeth for the Hundred, must shew in what Hundred it is, and not drive the other party to shew it. Eighthly,

Hundredors.

No Hundredors.

ly, his challenge for the Hundred is not simpliciter, but secundum quid; for though it be found that he hath nothing in the Hundred, yet shall he not be drawn, but remain præter H. that is, besides for the Hundred; and albeit he dwelleth, or have Land in the Hundred, yet must he have sufficient Freehold.

Note, This challenge for want of Hundredors must be given in writing presently, and the other party is to demur thereto, if opposed.

If a challenge be, that there is not any Hundredor returned, it may be averred to the Court, that there is not any sufficient within the Hundred, which is not within the Fee of the Plaintiff, although this be not returned by the Sheriff, and this be found true by Tryors, the Array shall be affirmed. 45 Ass. 1.

If the King be made Party by aid prayer, and sufficient Hundredors do not appear, nor are returned, yet the Pannel shall not be quashed, but a Tales of Hundredors shall be returned. But betwixt common persons in such cases the Pannel shall be quashed, and this shall not be only a challenge to the Heads. 25 E. 3. 43.

If the Sheriff return quod non sunt plures del Hundred, he shall take of the Hundred adjoyning, which shall be sufficient. 19 H. 6. 48.

If the Juror hath sufficient Land within the Hundred, although he doth not dwell within the Hundred, yet he is a sufficient Hun-

Hundredor. 9 H. 6. 66. May though he dwell in another County.

If he be not Hundredor at the return of the Venire, but be at the return of the Distringas, yet this doth not take away the challenge.

At what time the Challenge must be.

After four are sworn, or after a challenge to the Polls, there can be no challenge for the Hundred. Rolls tit. Tryal 636.

Who shall be a sufficient Hundredor. See Williams his Reading aforesaid.

If he dwell or have Assets within the Leet, Rape, Franchise or Vill, where the Venue is, he is a sufficient Hundredor.

If he hath Assets in Rent, Common, of any sort, Market, Fair, Piscary, Toll passage, Leet, Office of Bayliwick, &c. he is a sufficient Hundredor; otherwise of an Advowson, &c.

Challenges *propter affectum.*

3. Propter affectum: and this is of two sorts, either working a principal challenge, or to the favour. And again a principal challenge is of two sorts, either by Judgment of Law, without any Act of his, or by Judgment of Law upon his own Act.

Principal Challenge.

And it is said that a principal challenge is, when there is express favour, or express malice. First, without any Act of his, as if the Juror be of Blood or Kindred to either Party, Consangnineus, which is compounded ex Con & sanguine, quasi eodem sanguine natus, as it were issued from the same Blood; and this is a principal challenge, for that the Law presumeth that one Kinsman doth favour another before a Stranger, and how far remote soever he is of Kindred,

Kindred. Siderfin 2 part 155.

yet

yet the challenge is good. And if the Plaintiff challenge a Juror for Kindred to the Defendant, it is no Counter-plea, to say that he is of Kindred also to the Plaintiff, though he be in a nearer degree. For the words of the Venire facias, forbid the Juror to be of Kindred to either Party.

If a Body Politick or Incorporate, sole or aggregate of many, bring any Action that concerns their Body Politick or Incorporate, if the Juror be of Kindred to any that is of that Body (although the Body Politick or Incorporate can have no Kindred, yet) for that those Bodies consist of natural Persons, it is a principal challenge. * A Bastard cannot be of Kindred to any, and therefore it can be no principal challenge. And here it is to be known, that Affinitas, Affinity hath in Law two senses. In its proper sense it is taken for that nearness that is gotten by Marriage, Cum duæ cognationes inter se divisæ per nuptias copulantur, & altera ad alterius fines accedit, & inde dicitur Affinis. In a larger sense Affinitas is taken also for Consanguinity and Kindred, as in the Writ of Venire facias, and otherwhere. Affinity, or Alliance by Marriage is a principal challenge, and equivalent for Consanguinity, when it is between either of the Parties, as if the Plaintiff or Defendant marry the Daughter or Cousin of the Juror, or the Juror marry the Daughter or Cousin of the Plaintiff or Defendant, and the same continues, or Issue be had. But if the Son of the Juror hath married the Daughter of the Plaintiff, this is no principal chal-

Bodies Politick.

Affinity.

lenge, but to the favour, because it is not between the Parties. Much more may be said hereof, sed summa sequor fastigia rerum.

Peremptory Challenge upon Record.

As if he hath formerly tryed the Cause, although reversed by Error, or upon the same title; if the Record be not shewed, this challenge is not peremptory. For he that grounds a challenge upon a Record, &c. ought to have the Record ready. 33 H. 6. 55. The Record ought to be exemplified. 21 E. 4. 74.

'Tis a good challenge to say the Juror was attainted in an Attaint or Writ of Conspiracy; but attainder in a Writ of Forgery of false Deeds upon the Statute 1 H 5 3. (but 'tis upon 5 Eliz.) 14. is not, because this Attainder is given of late time by the Statute 33 H. 6. 55.

In a Writ of Conspiracy, 'tis a principal challenge, That the Juror was one of the Indictors, although the Tryal is now of the Conspiracy, and not upon the first point, viz. the Felony.

In Trespass, if one justifie as Master, and the other as Servant; 'tis not a principal challenge to say the Juror passed in the first Issue for the Master, but he ought to conclude, & istint favourable. 18 E. 4. 12.

If two plead not Guilty, and first one Issue is tryed and then the other is tryed; 'tis no Challenge to say the Juror tryed the other Issue, and gave Damages, of which Damages he shall be charged if he be attainted in an Attaint, for perhaps the Defendant will be found not Guilty.

That

That the Juror is within the distress of any of the Parties, is a good cause of challenge. And so it is, if he be within the distress of any person concerned, although no Party to the Action. As within the distress of A. the Master of the Defendant, who justifies as Servant to A. by reason of his Freehold; and the Issue is sur le franktenement. So for him in reversion received, within the distress of the Tenant for Life. And so in an Action by the Tenant for Life, within the distress of him in reversion: these are good challenges.

Deins distress.

So in an Action by Dean and Chapter, within the distress of the Chapter, or one of the Chapter, are good challenges.

Consanguinity of the half Blood is a principal challenge: If the Juror be at the ninth degree, if it can be shewed it is good.

Principal for Consanguinity.

In an Action by the Dean and Chapter, or Mayor and Commonalty, Brother to one of the Commonalty, or to one of the Commons, is a good challenge: so to any person concerned in interest, although no party to the Action. As Cousin to the Patron, or the Parson, &c. so in Attaint to one of the petit Jury.

But in an Ejectment, and not Guilty pleaded; 'tis no challenge to the Array that the Sheriff is Cousin to the Lessor of the Plaintiff: for it doth not appear that the Title of him in Reversion shall be in question, and he in Reversion is no Party to the Action. See it so adjudged upon Demurrer. Rolls tit. Tryal 653. But now in our feigned Ejectments it is otherwise, because

cause the Title of the Lessor is only in question.

Principal for Affinity.

'Tis a good challenge that the Juror is Gossip to the Plaintiff, & sic e converso; and so although the Son be dead; for the spiritual Affinity remains, and so is Curat of the Juror. That the Juror hath married the Sister of the party. That the Daughter of the Uncle of the Juror hath married the Uncle of the party. Cousin to the Wife of the party. These are good challenges, although the Wife, &c. is dead, if her Issue be alive; otherwise if she be dead without Issue, for then the cause of the favour is determined.

But 'tis no challenge to say the Juror is Brother to one who married the Sister of the party; nor that the Son of the party married the Sister of the Juror: because these are not parties to the Action.

In Attaint 'tis a good challenge to the Juror, that he hath married the Sister of the Wife of one of the petit Jury, for the Alliance.

Principal for favour.

If a Juror declare the right of one Party, or give his Verdict before hand, or take mony, this is a principal challenge; but if he promise a party, this is not a principal challenge, but for favour.

Principal for malice.

If the Action depending betwixt the party and Juror, be such as implieth Malice, this is a good challenge; but not if it imply no Malice.

That the party hath an Appeal depending against the Juror, or the Juror against him, or Action of Battery. That they are in debate and wrangling, &c. are good challenges.

ges. Not Actions of Debt or Trelpals, Quare clauſum fregit, &c. Nor that the Brother, &c. of the Party, hath Actions againſt the Juror.

That the Juror was born out of the Kings Ligeance; for although he came into England an Infant, and is ſworn to the King, yet he continues an Alien; and that he is Outlawed, for then he is not legalis homo, are good challenges. Peremptory. Alien.

If the Juror ſays that he will paſs for one party, becauſe he knows the verity of the matter, this is no challenge: But if he ſays 'tis for favour, 'tis a good challenge, if the Tryors find he ſpoke for favour, and not for truth. For favour.

In an Action betwixt the King and a party, the Subject cannot take any challenge for favour, as in an Indictment of Barretry, &c. the Defendant cannot challenge a Juror for favour to the King. King.

If the Record be in the ſame Court, it need not be ſhewn, but if it be in another Court, it ought to be ſhewed; or elſe 'tis no principal challenge. How Challenges ſhall be taken of a Record.

After the Array is affirmed, there ſhall not be ſuch challenge to a Juror which would have been a ſufficient challenge to the Array. As 'tis not a good challenge that the Juror was impannelled at the denomination of a party, for this had been a good challenge to the Array. At what time they may be taken.

If a Man challenge a Juror for non-ſufficiency of Freehold, and this is adjudged againſt him, yet he may challenge for favour, and this ſhall be tryed. 10 H 6. 18.

If the Jury upon finding of the principal do not tax the Damages, for which a Venire facias issues to the same Jurors, to tax the Damages, the parties cannot take any challenge for a cause before the first Tryal. But for a cause arising after they may. And so against les primes Jurors.

King.

The King cannot challenge a Juror after he is sworn, unless it be for a cause arising after he is sworn.

In what cases he which challenges ought to shew the cause presently.

If the Defendant challenge the Array which is found against him, or he release the challenge, and the Array is affirmed, and afterwards he challenge a Juror; he ought to shew the cause presently.

But if there be two Defendants, and one challenge the Array, and afterwards both challenge a Juror; the other shall not shew cause presently.

If a Juror be challenged, and there be enough of the Pannel besides, the cause of challenge need not be shewed unless the other side challenges touts peravail.

If any of the Jurors be sworn, and there be not sufficient, for which a Tales is granted, and at the return one of the primer Jurors is challenged, the cause ought to be shewed presently, he being sworn before.

King.

In an Action between the King and a common person, as in an Indictment of Barretry, presentment of nulance, &c. the Defendant if he challenges any Juror, must shew the cause presently.

But

But in an Inquest betwixt the King and a Stranger, the Stranger need not shew the cause presently; for in this case the King is as a common Person of the Realm.

Cause ought to be shewed before the Tales be perused.

If both Parties challenge, although for several causes, as if one be for Favour, and the other Peremptory; yet the Juror shall be drawn without shewing cause. Treat.

It may be in an Inquest before the Sheriff to inquire of Waste, both to the Array and Polls. In what Inquest a Challenge may be.

But not in an Inquest of Office, as in a Writ of Inquiry of Damages.

In a Writ of Right a Challenge may be to the Polls del 4 Chivalers return.

Not of Cosinage to the Witnesses coming to try the Deed in an Assise.

If one Party challenge the Array which is affirmed, and afterwards challenge a Juror; he ought to shew cause presently, and this shall be tryed presently; but otherwise of the other, who did not take the Challenge to the Array. Tryal and Triors and Challenges.

The Challenge of him who first challenged, shall be first tryed; although the first be for Favour, and that of the others be riens deins H.

If the Venue be of two Counties, and both Pannels challenged, the Esliors shall be one of one Pannel and the other of the other.

If the Array be challenged, the Court to try the Array may chuse two Triors, according to their discretion, 29 Ass. 15. 19 H. 6. 9.

What Challenge they may try.

If an Action be depending between the Juror and one of the Parties, and for this he is challenged, and the other says that this is brought by Covin; the Triors may try this; for although the Action is of Record, yet the Covin is not.

Evidence.

The Juror may be examined upon a Voier dire, to any Challenge that is not to his dishonour; but the Triors are not bound by his Oath.

The Triors after they are sworn may go at large by assent of the Parties until another day.

In what cases a Challenge or Affirmance by one shall serve for others.

In Trespass against two who plead to issue, and a Venire fac. is returned, although one accept the Array, yet the other may challenge it, and if it be found, the Array shall be quashed against all. So in an Appeal against Principal and Accessory, for one shall not disinherit the other.

But in an Appeal by two, if the Defendant challenge a Juror, and one of the Plaintiffs agree to this; the other shall not be received to say that this is by Covin, but the Juror shall be drawn in favour to the Life of Man.

And yet in a Præcipe quod reddat by two, and the Tenant challenge the Array, because the Sheriff is Gossip to one of the Demandants, and one Demandant acknowledge the Challenge, the other may say that this is not so, and have it tryed, Rolls Tit. Tryal 662. &c.

Ley Gager.

In Gager de Ley none shall be challenged for favour or insufficiency, &c.

If

If there be a Challenge for Cosinage, he that takes the Challenge must shew how the Juror is Cousin. But yet if the Cosinage, that is, the effect and substance be found, it sufficeth; for the Law preferreth that which is material, before that which is formal. Cosinage.

If the Juror have part of the Land that dependeth upon the same Title. Depending on the same Title

If a Juror be within the Hundred, Leet, or any way within the Seigniory, immediately or mediately, or any other distress of either Party, this is a principal Challenge. But if either Party be within the distress of the Juror, this is no principal Challenge, but to the Favour. Distress.

If a Witness named in the Deed be returned of the Jury, it is a good cause of Challenge of him. So if one within age of one and twenty be returned, it is a good cause of Challenge. Witness. Infant.

Upon his own Act, as if the Juror hath given a Verdict before, for the same cause, albeit it be reversed by Writ of Error, or if after Verdict Judgment were arrested. So if he hath given a former Verdict upon the same Title or Matter, though between other Persons. But it is to be observed, that I may speak once for all, that in this or other like Cases, he that taketh the Challenge must shew the Record, if he will have it take place as a principal Challenge, otherwise he must conclude to the Favour unless it be a Record of the same Court, and then he must shew the Day and Term. Challenges arising from the Jurors own Act. Former Verdict.

So

Indictment.

So likewise one may be challenged, that he was Indictor of the Plaintiff or Defendant, either of Treason, Felony, Misprision, Trespass, or the like in the same cause.

Godfather.

If the Juror be Godfather to the Child of the Plaintiff or Defendant, or e converso, this is allowed to be a good Challenge in our Books.

Arbitrator.

If a Juror hath been an Arbitrator chosen by the Plaintiff or Defendant, in the same Cause, and have been informed of, or treated of the Matter, this is a principal Challenge. Otherwise if he were never informed nor treated thereof; and otherwise if he were indifferently chosen by either of the Parties, though he treated thereof. But a Commissioner chosen by one of the Parties, for examination of Witnesses in the same cause, is no principal cause of Challenge; for he is made by the King under the Great Seal, and not by the Party as the Arbitrator is, but he may upon cause be challenged for Favour.

Commissioner.

Arbitrator in another matter is no cause of Challenge.

Counsel.

If he be of Counsel, Servant, or of Robes or Fée, or of either Party, it is a principal Challenge.

Eat or Drink at the Parties charge.

If any after he be returned, do Eat and Drink at the Charge of either Party, it is a principal cause of Challenge, otherwise it is of a Trior after he be sworn.

Actions of Malice.

Action brought either by the Juror against either of the Parties, or by either of the Parties against him, which may imply Malice

Malice or Displeasure are causes of principal Challenge, unless they be brought by Covin, either before or after the return; for if Covin be found, then it is no cause of Challenge; other Actions which do not imply Malice or Displeasure, but are to the Favour, as an Action of Debt, &c. More 3.

In a cause where the Parson of a Parish is Party, and the Right of the Church cometh in debate, a Parishioner is a principal Challenge. Otherwise it is in Debt, or any other Action where the Right of the Church cometh not in question. Parson and Parishes.

If either Party labour the Juror, and give him any thing to give his Verdict, this is a principal Challenge. But if either Party labour the Juror to appear, and to do his Conscience, this is no Challenge at all, but lawful for him to do it. To labour the Jury.

That the Juror is a Fellow Servant with either party, is no principal Challenge but to the Favour. Fellow Servant.

Neither of the parties can take that Challenge to the Polls, which he might have had to the Array. To the Polls.

Note, If the Defendant may have a principal cause of Challenge to the Array, if the Sheriff return the Jury, the Plaintiff in that case may for his own expedition, alledge the same, and pray Process to the Coroners, which he cannot have, unless the Defendant will confess it; but if the Defendant will not confess it, then the Plaintiff shall have a Venire facias to the Sheriff, and the Defendant shall never take any Chal- *Venire facias* to the Coroners.

Challenge for that cause, and so in like cases. But on the part of Defendant, any such matter shall not be alledged, and Process prayed to the Coroners, because he may challenge the Jury for that cause, and can be at no prejudice.

Challenge to the Favour.

Challenge concluding to the Favour, when either party cannot take any principal Challenge, but sheweth causes of Favour, which must be left to the Conscience and Discretion of the Triors, upon hearing their Evidence to find him favourable or not favourable. But yet some of them come nearer to principal Challenge than other; As if the Juror be of Kindred, or under the distress of him in the Reversion or Remainder, or in whose Right the Avowry or Justification is made, or the like: These be principal Challenges, because he in Reversion, Remainder, or in whose Right the Avowry or Justification is, is not party to the Record; otherwise it is, if they were made parties by Aid, Receipt or Voucher, and yet the cause of Favour is apparent; so it is of all principal causes, if they were party to the Record. Now the causes of Favour are infinite, and thereof somewhat may be gathered of that which hath been said, and the rest I purposely leave the Reader to the reading of in our Books concerning that Matter. For all which the Rule of Law is, That he must stand indifferent as he stands unsworn.

Favour.

King.

The Subject may challenge the Polls, where the King is party. And if a Man be outlawed of Treason or Felony at the Suit of

of the King, and the party for avoiding thereof allegeth Imprisonment, or the like, at the time of the Outlawry, though the Issue be joyned upon a collateral Point, yet shall the party have such Challenges, as if he had been arraigned upon the Crime it self, for this by a mean concerneth his Life also.

Propter delictum, As if the Juror be attainted or convicted of Treason or Felony, or for any Offence to Life or Member, or in Attaint for a false Verdict, or for Perjury as a Witness, or in a Conspiracy at the Suit of the King, or in any Suit (either for the King, or for any Subject) be adjudged to the Pillory, Tumbrel, or the like, or to be branded, or to be stigmatised, or to have any other Corporal Punishment whereby he becometh Infamous, (for it is a Maxim in Law, Repellitur a sacramento infamis,) these and the like are principal causes of Challenge. So it is if a Man be outlawed in Trespass, Debt, or any other Action, for he is Exlex, and therefore is not legalis homo. And old Books have said, That if he be excommunicated, he could not be of a Jury.

Challenges *Propter delict'.*

Infamous.

Outlawed.

A Bastard may be of a Jury, yet may be challenged if he be of Kindred, Jenk. Cent. 1. Cap. 90.

Bastard.

See the Statutes of W. 2. and Artic. supra Chartas, what persons the Sheriff ought to return on Juries. And see F. N. B. breve de non ponendis in Assisis & juratis; and the Register in the same Writ. And see there what remedy

Who ought to be on Juries.

remedy the party hath that is returned against Law.

At what time Challenges must be taken.

It is necessary to be known, the time when the Challenge is to be taken. First, He that hath divers Challenges, must take them all at once, and the Law so requireth; indifferent Trials, and divers Challenges are not accounted double. Secondly, If one be challenged by one party, if after he be tried indifferent, it is time enough for the other party to challenge him. Thirdly, after Challenge to the Array, and Trial duly returned, if the same party take a Challenge to the Polls, he must shew cause presently. Fourthly, So if a Juror be formerly sworn, if he be challenged, he must shew cause presently, and that cause must rise since he was sworn. Fifthly, When the King is party, or in an Appeal of Felony, the Defendant that challengeth for cause, must shew his cause presently. Sixthly, If a Man in case of Treason or Felony, challenge for cause, and he be tried indifferent, yet he may challenge him peremptorily. Seventhly, A Challenge for the Hundred must be taken before so many be sworn as will serve for Hundredors, or else he loseth the advantage thereof.

Hundredors.

Writ of Right

In a Writ of Right, the Grand Jury must be challenged before the four Knights, before they be returned in Court; for after they be returned in Court, there cannot any Challenge be taken unto them.

Nota,

Nota, The Array of the Tales shall not be challenged by any one party, until the Array of the principal be tried; but if the Plaintiff challenge the Array of the principal, the Defendant may challenge the Array of the Tales. After one hath taken Challenge to the Poll, he cannot challenge the Array. The Array of the *Tales*.

Now it is to be seen how challenge to the Array of the principal Pannel, or of the Tales, or of the Polls shall be tried, and who shall be Triors of the same, and to whom Proces shall be awarded.

If the Plaintiff alledge a cause of Challenge against the Sheriff, the Proces shall be directed to the Coroners; if any cause against any of the Coroners, Proces shall be awarded to the rest; if against all of them, then the Court shall appoint certain Elisors or Esliors, (so named ab eligendo) because they are named by the Court, against whose Return no Challenge shall be taken to the Array, because they were appointed by the Court, but he may have his Challenge to the Polls. Note, If Proces be once awarded for the partiality of the Sheriff, though there be a new Sheriff, yet Proces shall never be awarded to him; for the Entry is, Ita quod Vicecomes se non intromittat. But otherwise it is, for that he was Tenant to either party, or the like. Coroners. Elisors.

If the Array be challenged in Court, it shall be tried by two of them that be impannelled to be appointed by the Court: for the Triors in that case shall not exceed the Array. Two Triors.

the number of two, unleſs it be by conſent. But when the Court names two for ſome ſpecial cauſe alledged by either party, the Court may name others; if the Array be quaſhed, then Proceſs ſhall be awarded, ut ſupra. If there be a demur to a Challenge, the Judge before whom the cauſe is to be tried, may determine it, or adjorn it to be heard another time, Stiles 464. Vide Bulſtr. 1 part 114.

Demur to a Challenge, how determinable.

Array of the Principal and *Tales*.

If a Pannel upon a Venire facias be returned, and a Tales, and the Array of the principal is challenged, the Triors which try and quaſh the Array, ſhall not try the Array of the Tales; for now it is, as if there had been no appearance of the principal Pannel; but if the Triors affirm the Array of the Principal, then they ſhall try the Array of the Tales. If the Plaintiff challenge the Array of the Principal, and the Defendant the Array of the Tales, there the one of the Principal and the other of the Tales ſhall try both Arrays. For other matter concerning the Tales, ſee in Cooks Reports, matters worthy of obſervation.

Two Triors.

When any Challenge is made to the Polls, two Triors ſhall be appointed by the Court; and if they try one indifferent, and he be ſworn, then he and the two Triors ſhall try another; and if another be tried indifferent, and he be ſworn, then the two Triors ceaſe, and the two that be ſworn on the Jury ſhall try the reſt.

Trials of Challenges.

If any of the Jury, after ſome of them be ſworn, be challenged, thoſe that are ſworn are to ſay, whether he that is challenged be

be indifferent or not. But if the first or second Man be challenged, then the Court doth use to appoint some of them, (who it pleaseth,) that shall be afterwards sworn to try the indifferency of the person challenged.

Rules concerning Challenges

1. All Challenges must be taken before the Jurors are sworn.

2. If one challenge a Juror, and it be found against the Challenger, he may not challenge the Juror for the second cause.

3. If one challenge the Array, and it be found against him, he may not afterward challenge any of the Polls, without shewing cause presently; and this shall be tryed presently.

4. No Challenge shall be admitted against the Triors appointed by the Court.

Trial of Challenges.

If the Plaintiff challenge ten, and the Defendant one, and the twelfth is sworn, because one cannot try alone, there shall be added to him one challenged by the Plaintiff, and the other by the Defendant. When the Trial is to be had by two Counties, the manner of the Trial is worthy of observation, and apparent in our Books. If the four Knights in the Writ of Right be challenged, they shall try themselves, and they shall choose the Grand Assise, and try the Challenges of the parties. If the cause of Challenges touch the dishonour or discredit of the Juror, he shall not be examined upon his Oath; but in other cases he shall be examined upon his Oath, to inform the Triors. If an Inquest be awarded by default, the Defendant hath lost his Chal-

Juror examined.

lenge; but the Plaintiff may challenge for just cause, and that shall be examined and tried.

View. Whersoever the Plaintiff is to recover per visum juratorum, there ought to be six of the Jury that have had the view, or known the Land in question so as he be able to put the Plaintiff in possession, if he recover.

Challenges. In Proprietate probanda, and a Writ to inquire for Waste, the parties have been received to take their Challenges. But passing over many things touching this matter, I will conclude with the saying of Bracton, Plures autem aliæ sunt causæ recusandi juratores, de quibus ad præsens non recolo, sed quæ jam enumeratæ sunt, sufficiant exempli causa, 1 Inst. 157, 158.

Treat what. Treat doth signifie as taken out or withdrawn, and is applied to a Juror, that is withdrawn by consent, or removed and discharged by Challenge.

A Juror sick was withdrawn, and another sworn, Palmers Rep. 411.

King. After Evidence given the King cannot draw a Juror, but before he may; but after Evidence on his prayer the Court may discharge the Jury, Keeble 2 part, 506.

Challenge lost. If the Defendant do not appear at the Trial when he is called, he loseth his Challenge to the Jurors, although he doth afterwards appear.

A wrong name 'Tis a good Challenge to a Juror to say he is returned by another Name in the Pannel.

A

A Juror appeared and said he had no Freehold, and prayed that he might not serve, yet the Judge would not spare him; for he may have an Action against the Sheriff for returning him, Rolls 2 part, Reports 483. No Freehold.

The Challenge pro defectu Hundred. must be written in Parchment, and the Council must arraign it in French, upon which the Defendant may take Issue or demur. The Clerk or Associate in Court must call the Jury over, and ask if they have any Lands within the Hundred, or had at the time of the Array of the Pannel, and whether they dwell, or did dwell, in the same. And upon examination if it appear clearly, that they have no Lands or Tenements, nor dwell in the Hundred; then the Clerk is to mark them by the side of every of their Names thus [præter Hundred.] but if he find there be two Hundredors, he is to resort back to the præter Hundred. and swear them in order. So that you see the Trial whether Hundredors or not, is determined by the Courts examination by the Poll severally. But if the Council demur, and the other side joyn in Demurrer, the Judge of Assises may affirm the Challenge, and over-rule the Demurrer, or allow the Demurrer good, and proceed to the Trial of the Cause, or if the Judge doubt, it may be determined in Bank, but this is great delay. If the Challenge be adjudged good, the Court awards, Que le pannel il soit casse.

In Cities, Corporations, Burroughs and Towns, and Counties, this Challenge cannot be.

At Common Law there ought to have been four Hundredors returned and appeared in all Actions pro meliori notitia causæ in controversia, for vicini vicinorum facta scire præsumuntur. But by the Statute 35 H. 8. cap. 6. six are to be returned and appear. But since by the Statute 27 Eliz. cap. 6. if two Hundredors be returned and appear, it is sufficient in all personal Actions: But in real Actions there must be six, or else Remanet pro defectu Jur.

Hundredors.

Note, In an Information of Forgery to be tried at Bar upon the Attorny Generals motion, that the Defendant might not challenge for want of Hundredors; it was denied him, Keebles 3 part, 740.

The Court shall appoint two Triors in a Challenge to the Poll, and if they find two indifferent, the first Triors shall be discharged, and the two that are found indifferent, being sworn to try the Issue, shall also be sworn to try the rest of their Fellows.

At Common Law there used to be returned 24 upon the Venire, and afterwards a Habeas corpora with a Decem Tales, and if a full Jury did not appear or were challenged, then a Distringas with an Octo Tales, and so to the Duo Tales, if there were not a full Jury. And this was the course until the Statute 35 H. 8. which gives the Tales de circumstantibus at the Assises, &c. and by the Stat. 5 Phil. & Mar. cap. 7. where the King, Quæn or Informer, &c. are parties.

Tales de circumstantibus may be in the case of Aliens.

A Challenge may be taken to those of the Tales de circumstantibus.

By

By the Statute 33 Ed. 1. The King and those who prosecute for him, must shew their cause of Challenge, as betwixt party and party, and left to the discretion of the Justices.

The King or any one authorised for him may release his Challenge. Where the party may challenge, the King may challenge.

'Tis no Challenge to say, the Juror is the Kings Tenant, or that he is favourable to the King; but 'tis good to say, the Sheriff or Juror bears grudge or malice to the Defendant where the King is party. If the Juror hath any Freehold 'tis sufficient, although not to 40 s. a year: For the Statute which injoins that, speaks only betwixt party and party.

The first who challenges, be he Plaintiff or Defendant, shall have the preference and advantage of his Challenge. If a Juror be once challenged and withdrawn upon the principal; he cannot serve upon the Tales, if he doth 'tis Error, and Judgment may be staied; And so if he be challenged, and a Jury remain pro defect. Juratorum, if he be sworn upon a new Distringas, 'tis Error, not helped by any Statute of Jeofails, and a mistrial, and a Venire facias de novo may be awarded, Cro. El. f.429. Whitbies Case.

Elisors may be sworn in some cases to return and impannel all Juries, as should upon any Venire facias, Habeas corpora or Distringas Jur. come to their Hands impartially, indifferently and without favour or affection, nor at the denomination of any person.

The Record of Attainder, Conviction, Excommunication, Outlawry, &c. or a Copy thereof ought to be produced to prove the cause of challenge thereupon.

Where Bodies Politick or Corporate are concerned, a Challenge may be taken which arises from the individuals, as Brother to one of the Prebendaries, is a good Challenge where the Dean and Chapter are parties, &c. Hob. 87. So a Parishioner, where the Right of the Church comes in question at the Suit of the Parson, 17 Ass. 15.

In High-Treason the Prisoner may peremptorily challenge to the number of 35, which is under the number of 3 Juries, but in Petite Treason, Murder or Felony the number is reduced to 20. The Prisoner may challenge any that are Witnesses against him.

Where the King is party the Defendant must shew the cause of his Challenge instantly.

After a Challenge for cause, the Prisoner may challenge the same person peremptorily.

Grand Jury. One of the Petty Jury was challenged because he had been of the Grand Jury, and found the Bill, Sinderfin 244. 'Tis a good Challenge.

CAP.

CAP. X.

Cap. 10.

Of what Things a Jury may inquire; when of Spiritual; when of Things done in another County, or in another Kingdom; when of Eſtopples, and when not; when of a Mans Intent, &c.

THE next Words in the Writ, which have not yet been taken notice of, are theſe, Per quos rei veritas melius ſciri poterit; and this is the chief end of their meeting together: No Court can give a right Judgment, unleſs the truth of the Fact be certainly known; and to find out this Truth, no way is like to this of Juries; for they do not only go upon their own knowledge, though they are Neighbours to the place where the queſtion is moved, and ſo are preſumed to have a better knowledge of the Fact, than any others; for vicinus facta vicini præſumitur ſcire; But leſt this preſumption ſhould fail, the Law allows other Evidence to be given to them, by which they may more certainly and confidently give their Verdict of the Iſſue, which is meant by this word Rei.

See more of this matter, *cap.* 13.

Ex facto Jus oritur.

And here, it will not be amiſs to give you a brief deſcription, de quibus rebus, what the Inqueſt may inquire of, and find.

Of the Law.

Wherefore, though it be true, that a Jury shall not be charged, nor meddle with a matter of Law; and if they do, and find it, their Verdict as to this shall be void; yet daily experience (as well as Littleton, Sect. 368.) tells us, that they may take upon them the knowledge of the Law, and give a general Verdict; though to find the Special Matter is the safest way for them, because, if they mistake the Law, they run into the danger of an Attaint.

In the Case of Manby and Scot, adj. Trin. 13 Car. 2. B.R. one question was if the Verdict was well found, in an Action of the case against the Husband for Wares bought by the Wife; the Verdict finding, that the Wares were necessaries, and according to her Degree, whereas (as was objected) they ought to have found the Degree of the party, and the value of the Wares and left it to the Court to judge.

But it was answered and resolved that the Court, i. e. the Judge before whom 'tis tried informs the Jury of the Matter of Law, and accordingly they find, and so it belongs not to this Court.

Broughton a Reader of the Temple brought a Bill by Quo minus in the Chequer against Prince for maintaining a Suit against the Stat. &c. Prince pleads that he was admitted in the Inner-Temple, and Student for many years there, that he was Consiliarius, in Lege eruditus, and took his Fee in that cause. B. replied, de Injuria sua propria absque hoc quod in lege eruditus, &c. & hoc petit, &c. & defendens similiter.

It

It was moved that the Defendant ſhould demur to the Replication. Atkinſon excepted to the Traverſe and Concluſion; for it cannot be tryed by a Jury; for (ſays he) if matters in Law be to be tryed by the Judges, a fortiori, the learning of the Law ought to be tryed by them.

Per Manwood Chief Baron, It ſhall be tryed by the Country. 3 Leo. 237. Broughton verſ. Prince; which Caſe is cited 3 Cro. 728. to be otherwiſe ruled; yet it was allowed there a good Iſſue, whether a Parſon of a Pariſh could ſpeak Welſh.

Hut. 20, 21. Whether a plaint was levied according to the cuſtom, was tryed by a Jury who are directed by the Court as to the plaint, and whether it were purſuant to the cuſtom, and are to find according to ſuch directions.

In many Caſes, the Jury are to enquire of the knowledge and intent of a Man, as where the Nar. is, that the Defendant kept a Dog which killed the Plaintiffs Sheep, ſciens canem ſuum ad mordendos oves conſuetum; though ſciens be not traverſable, yet the Jury upon Evidence muſt enquire of it. lib. 4. 18. Of a Mans intent.

In ſome Caſes, a Jury may try and find a ſpiritual thing, as a Divorce, Matrimony, &c. and muſt take notice thereof, upon pain of Attaint. li. 4. 29. lib. 9. lib. 7. 43. vide hic cap 2. Of Spiritual things.

The Jury may find Baſtardy, but it was pleaded it muſt be tryed by Certificate. Baſtard.

So they may find a Divorce, for it is not matter of Record, but a matter in fait. Divorce,

The

In Treſpaſs *Quare cauſum fregit*, in the County of *D.* where the Treſpaſs was committed in the County of *S.* upon Not Guilty, if the Jury find the Defendant guilty in the County of *S.* their Verdict is void. But if they find him Guilty generally, an Attaint lyeth. *Finch.* 400. Becauſe this Treſpaſs is local; and what is local cannot be inquired of by men of another County, for they can have no conuſans of it.

The Jurors of one County, may find any tranſitory thing done in another County: nay ſome times they muſt find local things in another County; as if the Heir pleads riens per diſcent, and the Plaintiff replies, Aſſets in a Pariſh and Ward within London, the Jury may find Aſſets in any County; the ſame Caſe againſt an Executor, who pleads plene adminiſtravit; the Jury may likewiſe find Aſſets in any part of the World. And the Reaſon is, becauſe the place is only named for neceſſity of Tryal. But where the place is part of the Iſſue, it is otherwiſe. And therefore if I promiſe in one place to do a thing in another, and Iſſue is upon the breach, the Jury ought to come from the place of the breach. But if I promiſe in London, to do a thing at Burdeaux in France, and Iſſue upon the breach, yet this ſhall be tryed in London for neceſſity, becauſe otherwiſe it would want Tryal, the Jury muſt enquire of the breach at Burdeaux. But if I promiſe in France to do a thing in France, ſo that both Contract and Performance is beyond Sea, this wants Tryal in our Law. Lib. 6. 47. Lib. 7. 23, 26, 27.

Of things done in another County or Country. *Vide cap.* 8.

Rolls tit. Tryal f. 571, 624.

In the Caſe of Drake and Beere: Trin. 15 Car. 2. B. R. this difference was agreed by the Court, viz. That a Jury in an Inferiour Court may inquire of things out of the Juriſdiction,

risdiction, if they be but for increase of Damages, as is 1 Cro. 571. Ireland versus Blackwel; but if they enquire of any thing issuable out of that Jurisdiction, it is naught, 1 Cro. 101. 2 Cro. 503.

Jurisdiction of Courts.

Error was brought to Reverse a Judgment given in the Palace Court, in Indebitat. for that the Defendant was indebted to the Plaintiff Infra Jurisdictionem, for Nursing of a Child, not saying the Nursing was Infra Jurisdictionem.

Wadh. Windham Justice, held it good, for that it is a Debt every where, and not like a Debt that ariseth by matter collateral: But Twisden Justice doubted. Whitehead versus Brown. Pasch. 15 Car. 2. B. R.

Vide Sanders's Report, 1 part 73. Peacock against Bell and Kendal. The Plaintiff declared the Defendant Infra Jurisdictionem indebitatus fuisset to the Plaintiff in 39 l. pro diversis Merchandizis per quer. eidem Defendenti ante tempus illud vendit. & deliberat. Held naught in an Inferiour Court, for not saying ibidem vendit. &c. but good in a Superiour Court, and in the County Palatine of Durham, for that is an Original and Superiour Court.

Inferior Courts.

Estoppels.

When the Estoppel is found, the Court may judge according to the especial matter.

The Jury may find Estoppels, as the taking of a Lease of a Man's own Land, by Deed indented, or the delivery of a Deed before the Date, as in Debt by an Administrator, upon a Bond dated 4 Aprilis, 24 Eliz. The Defendant pleaded that the Intestate dyed before the date of the Obligation, and issint nient son fait, upon which they were at Issue, and adjudged that the Jury might find

find that the Bond was delivered the third of April, because they are sworn ad veritatem dicendum; though the parties are estopped to plead a Deed was delivered before the date; but they may plead a delivery after the date, because it shall never be intended that a Deed was delivered before the date, but after it may.

Estoppels. But if the Estoppel or Admittance be within the same Record, in which Issue is joyned, then the Jurors cannot find any thing contrary to this, which the parties have affirmed, and admitted of Record, though it be not true, for the Court may give Judgment upon matters confessed by the parties; and the Jurors are not to be charged with any such thing, but only with such in which the parties vary. Lib. 2. 4. Lib. 4. 53. Co. Lit. 227.

(C. 2) Decree. A Decree in Chancery, shall be tryed by a Jury, and not by it self; for it is not a Record, but a Decree Recorded. The Chancery, as it is a Court of Equity, is not a Court of Record, but touching things agitated in the Petty-Bag Office, it is a Court of Record.

Exemplification. Exemplification of a Decree in Chancery, which has Bill and Answer, allowed good Evidence. Keebles 1 part 21. Deeds, &c.

(2. f. 2) Records not shewed. The Jury may find Deeds or matter of Record, if they will, though not shewed in Evidence. Finch 400. They may inquire of things done before the memory of Man. Lib. 9. 34.

The

The Jury in many Cales may find matters in a Foreign County, Conditions, Records, Releales, &c. As in Battery of the Plaintiffs Servant in one County and lols of Service in another County, this Damage in the other County may be inquired of by the Jury of the County where the Battery is laid. The like of Aſſets becauſe Tranſitory, otherwiſe of a local Treſpals, &c. Foreign County.

Nul tiel Record is not to be tryed by a Jury, but upon the general Iſſue, &c. they may find a Record.

The Jury may find a Warranty, being given in Evidence, though it be not pleaded: nay, the Jury may find that which cannot be pleaded; as in Treſpals, upon not guilty; The Jury may find that the Defendant leaſed Lands for Life, upon Condition, and entred for the Condition broken; though this cannot be pleaded without Deed, yet the Jury may find it. Lit. Sect. 366. Warranty. Condition.

Where a collateral Warranty binds, this may well be given in Evidence: for although it doth not give a right, yet in Law this ſhall bar and bind a Right. Lib. 10. 97.

But this matter comes more properly under the Title Evidence, wherefore we will proceed to that.

See alſo in Chap. 13.

CAP.

CAP. XI.

Evidence and Witneſſes.

Evidence. EVidence, Evidentia: This Word in legal underſtanding (ſaith Coke 1 Inſt. 283.) doth not only contain matters of Record, as Letters Patents, Fines, Recoveries, Inrolments, and the like, and Writings under Seal; as Charters and Deeds, and other Writings without Seal; as Court-Rolls, Accounts, and the like, which are called Evidences, Inſtrumenta. But in a larger ſenſe, it containeth alſo Teſtimonia, the Teſtimony of Witneſſes, and other proofs to be produced and given to a Jury for finding of any Iſſue joyned between the Parties: and it is called Evidence, becauſe thereby the point in Iſſue is to be made evident to the Jury: Probationes debent eſſe evidentes (id eſt) perpicue & facile intelligi.

And this Evidence (with Bracton) we may term probatio duplex, viz. viva, as Witneſſes, viva voce; and Mortua, as by Deeds, Writings and Inſtruments; and Violenta præſumptio, in many Caſes, is plena probatio, and therefore if all the Witneſſes to a Deed be dead, then the Deed ſhall receive credit; per collationem ſigillorum ſcripturæ, &c. but eſpecially if there hath been a continual and quiet poſſeſſion; which is a violent preſumption. 1 Inſt. 6. for no Man can keep his Witneſſes alive.

Preſumption.

If

If a thing be generally referred to proof, this shall be intended proof by Jury; but if other manner of proof be agreed upon, that shall take away the proof which the Law generally intends by Jury: Hob. 127. As if I promise to pay what Mony you prove B. borrowed; this may be proved in the same Action brought upon the promise. Vide Rolls tit. Tryal 594, 595. Proof. (E.12)

In Felonies, &c. the persons that give Evidence for the Prisoner against the King are not sworn, but see Siderfin 211.

B. was Indicted for striking F. in West-minster Hall, and the Witnesses that gave Evidence for B. were admitted to be sworn. Indictments.

And so the Defendants Witnesses in Appeal of Murder. 325. And the Court would not allow Evidence upon Oath, given upon the Indictment, although the Witness was dead; nor is Evidence upon the Indictment of Trespass, Evidence upon an Action of Trespass, ibid.

Upon Indictments and Informations concerning criminal Offences, as against a Justice for compounding of Recognizances, &c. Upon motion the Court will order the Prosecutor to give particular instances that the Defendant may know what to defend. Keeble 2 part. 220.

A Jew being a Witness is sworn on the Old Testament, and Perjury upon the Statute 5 Eliz. cap. 9. may be assigned upon this Oath: so if it be taken on the Common Prayer Book, that hath the Epistles and Gospel. Keebles 2 part 314. Hill. 19,20 Car. 2. B. R.

Men

Witneſſes.

321.

Men that are ſo branded with Infamy, that they cannot be Jurors, (for which ſee before who may be Jurors) cannot be Witneſſes; yet per Glyn Chief Juſtice and Newdigate Juſtice, Mich. 1657. B. R. Conviction of common Barretry hinders not from being a Witneſs; but Maynard, Serjeant, held ſtrongly againſt it.

Dº.

At Lent Aſſiſes, Suffolk, 1657. St. John Chief Juſtice C. B. would not allow one who had been whipped for Petty Larceny, to be a Witneſs; but Earl Serjeant ſaid, they ought to be ſtigmatici that are diſabled from being Witneſſes: Yet per Roll Chief Juſtice, one burnt in the Hand for Felony may be a Witneſs; for he is in capacity to purchaſe Lands, and his fault is purged by his puniſhment. Stiles 388.

Who may be Witneſſes.

325. V

The Wife cannot be a Witneſs for or againſt her Husband. 1 Inſt. 6. that is, in caſe of a common perſon, between party and party; but between the King and the party on an Indictment ſhe may, although it concerns the Feme her ſelf, as in the Lord Audley's Caſe, Hut. 116. So ſhe may have the Peace againſt her Husband.

325. V

In an Indictment proſecuted by the Husband, for ſeducing away his Wife, and keeping her ſome time in Adultery. The Wife was admitted to be a Witneſs againſt the Defendant, Coram Judice, Windham, Lent Aſſiſes at Aylesbury, and the Defendant was found guilty. She may be a Witneſs to prove a Cheat upon her and her Husband. Siderfin 431.

And

And so it was resolved in John Brown's Case, Trin. 25 Car. 2. B. R. on the Statute of 3 H. 7. cap. 2. vid. 1 Cro. 492.

The King cannot be a Witness by his Letters under his Signet Manual: One attainted of Piracy cannot be a Witness to prove another guilty. If he accused another before he was attainted, and afterwards confesses he wronged him, this confession shall be rejected, because he is attainted. A Woman cannot be a Witness to prove a Man to be a Villain. Co. Lit. 6. 8.

Neither can the party to the usurious Contract, be a Witness against the Usurer, in an Information upon the Statute of Usury. But Kinsmen never so near, Tenants, Servants, Masters, Counsellors, and Attornies, &c. may be Witnesses. A Counsellor may be a Witness to the Agreement, &c. but not to validity of an Assurance, nor to the Counsel he gave. March, Rep. 43. If a Witness being served with Process, and having mony sufficient to bear his charges, (or less, if he accept it) do not appear to give his testimony, he forfeits 10 l. to the party damnified, and must recompence his damages. 5 Eliz. 9. If a Witness commit wilful perjury, he loseth 20 l. shall be imprisoned six Months without Bail, stand in the Pillory, and be disabled to be a Witness; so shall the suborner, who procures the Perjury. 5 Eliz. 9.

But an Attorny cannot be a Witness against his Clyent for matters subsequent to his being employed.

A party robbed is allowed a good Witness in his own Action against the Hundred, for he is not bound, nay is to be blamed, to tell any one what charge he carries with him;

and if he should not testifie, the Law would be often fruitless for want of Evidence, or else more Robberies committed by the parties discovering his Mony.

In the Case of Brereton and Tatam, Mich. 1656. B. R. Glyn Chief Justice, cited the Lord Chandoi's Case in this Court, where one Gates an Executor was produced to prove the Will, as a Witness, to which he (as Counsel) excepted, because of his Executorship. It was answered that he had fully administred: He replied, that Assets might afterward come to his hand; but the Court resolved that it would not be presumed to bar his Testimony, which was allowed in the principal Case, being in Ejectment.

It's no good exception to a Witness that he hath common pur cause of Vicinage in the Lands in question, because its but an excuse of Trespass, and no interest. Clapham's Case. Mich. 1657. B. R.

The same of common of Shacke.

If Obligee devises the Debt to the Obligor, and his Executors deliver up the Bond in satisfaction of the Legacy which is canceled, and after the validity of the Will is questioned, viz. whether the Testator was compos, &c. the Obligor is a good Witness for the Will, because by the cancelling of the Bond his Debt was discharged. But Contr. in Case of Mortgage, for though the Deed be cancelled, if it be no good Will, he must pay the Mony. Goodman vers. Turbervil. Mich. 1657. B. R.

An Action was brought by the Corporation of the Weavers of Norwich, for a Penalty against

against a Weaver for working at his Trade in Harvest time, contrary to an Ordinance by them made. And Atkins Justice allowed one of the Corporation to be a Witness, though one moiety of the Penalty was due to the Corporation. Lent Assise 1657.

In a Tryal at Bar, where an Estate for Life is limitted to J. S. remainder to the poor of the Parish of Greenwich by Will; the Inhabitants of Greenwich, were allowed to be Witnesses to prove the Will. Townsend and Roan, Mich. 1658. B. R. Siderfin 2 part 109.

An Action of Debt was brought, Summer Assises Suff. 1669. by the Town of Ipswich, for 50 l. a Fine set upon one chosen Common Council-Man (called their prime Constable) for refusing to renounce the Covenant, &c. And the Town-Clerk (though a Freeman) was allowed a Witness to prove Election, Refusal, &c. and the Fine set, which is for necessity, for that none other are or ought to be present at those Acts. Rainsford Justice.

Per Hale Chief Justice, Norfolk Summer Assises 1668. A Freemon of Lynn is not an allowable Witness to prove the Custom of Foreign bought and Foreign sold in that Town, Harwich versus Twels.

As to Witnesses Priviledges.

One was Subpena'd ad testificandum, and prayed a Priviledge from being Arrested, which was granted, and per Cur. it will supersede an Arrest upon mean Process, but not upon an Execution; yet the Sheriff in that Case may be committed for his Contempt. Hen. Neyil's Case, Mich. 15 Car. 2. B. R.

Detaining of Witnesses:

Sir Jo. Jackson was Convict of an Information for preventing of Evidence to be given on an Indictment of Perjury against Fenwick and Holt, who had been Witnesses for Sir J. J. he arrested some Witnesses, and gave mony to others, and so they were acquitted: He was fined one thousand Marks, one Months Imprisonment, Behaviour for twelve Months. Hill. 1663. B. R.

Proof. Proofs to determine matter of Fact, and to be offered to a Judge and Jury, are of two sorts. First Living, as by Witnesses, and to a Jury one Witness is sufficient. And Dead, as matters of Record, as Letters Patents, Fines, Recoveries, Inrolments, &c. Writings sealed and delivered; as Feoffments, Leases, Releases, &c. And without Seal, as Court-Rolls, Accounts, &c. And if the Case be between the King and a Prisoner, he is first to say what he can for himself, and then all that can say any thing against him are to be heard upon Oath, and then others may be heard for him, but not upon Oath: and according to this Evidence on both sides, or without any Evidence at all, the Jury are to give their Verdict, according to their knowledge and Oaths.

Such persons as are Infamous, as are persons attainted of Felony, or of a false Verdict, or of a Conspiracy, or of Perjury, or of Forgery, upon the Statute of 5 Eliz. cap. 14. and not upon the Statute of 1 H. 5. 3. and such as have had Judgment to lose their Ears, or stand on the Pillory or Tumbrel,

bzel, oz have been ſtigmatized oz branded, and Infidels, Men not of ſound Memozy, oz not of diſcretion, oz ſuch as are intereſſed in the Cauſe, oz have benefit, are not competent Witneſſes. Co. 1. Inſt. 6. but we ſée Jews are daily admitted Witneſſes.

The Jury are obliged to take cognizance of what is ſufficient Evidence, on pain of an Attaint, Evidence.

An account given to and allowed by the Oꝛdinary, is not good Evidence; noꝛ a Pedigree by a Herald at Arms, to pꝛove an Heir, but it muſt be pꝛoved by Deeds, Recoꝛds, oꝛ Witneſſes. *Plene adminiſtravit.* Pedigree.

In Debt againſt an Executoꝛ, ſuggeſting a Devaſtavit, any Evidence that pꝛoves Aſſets, is not ſufficient, but an actual Devaſtavit muſt be pꝛoved, foꝛ now the party is chargable in his own right, Keeble 2 part, 676. *Devaſtavit.*

If the Iſſue be a Recognizance oꝛ not, a Recognizance with a Defeazance is good Evidence. Plo. 14. So of an Agréement, a ſpecial Agreement will pꝛove it. Plo. 8. Recogniſance. Agreement.

A Licence to alien Land, oꝛ a pardon foꝛ alienation of Land, was held by a commou pꝛeſumption, to be a good pꝛoof that the Land was held in capite. Tenure in *Capite.*

A thing which is concluded in the Eccleſiaſtical Court, which doth concern Lands, is not to be given in Evidence; foꝛ the Courts of Common Law are not to be guided by their pꝛoceedings. Eccleſiaſtical proceedings.

Ancient Deeds may be given in Evidence, although the execution of them cannot be pꝛoved. Ancient Deeds.

An Ancient Deed found in the Archives of the

Vicar. Endowment.

Dean and Chapter, given in Evidence to prove the Endowment of the Vicar, though it appeared never to be sealed or delivered, Keeble 2 part, 126.

Do.

Payment time out of mind, is good Evidence of an Endowment. 729.

Copy of a Record.

He that takes out a Copy of part of a Record, must at least take out so much as concerns the matter in question; or else the Court will not permit it to be read.

Outlawry.

If one produce a Lease made upon an Outlawry, in Evidence to a Jury to prove a Title, he must also produce the Outlawry it self.

Feoffment.

To prove a Feoffment, a Deed of Feoffment is shewed, but no Livery is Indorsed, if possession has gone with the Deed, it is good Evidence. Rolls Rep. 1 part, 132.

Proviso.

Upon Not Guilty to an Information upon a penal Law, a Proviso to excuse him may be given in Evidence. Jones Rep. 320.

Non decimando.

If a Man prescribe in a non decimando generally, he cannot give a Bull in Evidence. Palmers Rep. 38.

Deed.

A Deed with the Seals torn off was admitted to declare Uses. Palmers Rep. 403, 405.

Records.

Records prove themselves, and cannot be proved by Witnesses; but Copies of them must, and are good Evidence and so may any thing done in the County-Court, Court-Baron, or Hundred-Court, &c. be proved by Witnesses.

A Copy of a Conviction upon an Indictment of Trespass, &c. shall not be admitted evidence singly by it self, in an Action of Trespass, &c. but with Evidence it shall.

A

A Fine or Common Recovery, may be given in Evidence, though it be not under the Great Seal, or Seal of the Court, and without vouching the Roll of the Recovery; and the part indented is the usual Evidence that there is such a Fine, though they which law the Fine, are also good Evidence, Plow. 410. Stiles 22. Fine.

When a Writ out of a Court of Record is only inducement to an Action, the taking out the Writ may be proved without Copy of it, for it is not of Record till it be returned. And so I think it may to prove the Point in Action, by Witnesses or Notes of it in a Book of Entries, &c.

Depositions in the Ecclesiastical Court cannot be given in Evidence, though parties be dead. March 120. A Defendants Answer in an English Court, is good Evidence against him, but not against others, Godbolt 326. Where the Evidence proves the effect and substance of the Issue, it is good. By Order of Court the Depositions taken of a Sick Witness may be given in Evidence. Depositions. 393

I cannot make use of Depositions in a Cause wherein I was not a Party, for as they cannot be read against me, no more can they be read for me, because I am not bound by them, nor in a capacity of examining Witnesses in it, or preferring Interrogatories. And 'tis not like the Case of an Ejectment brought by a Reversioner, or Debt upon the Statute of Ed. 6. brought by a Proprietor of Tithes, after a Verdict at Law, for the Lessee or the present

proprietor, the Reversioner of the Lands or Tithes shall have advantage of the Verdict, and give it in Evidence; and the reasons are, because they cannot be immediate Parties to the Action or Suit, for that must be prosecuted by the Lessée or present Tenant, and they may give in Evidence as well as the Plaintiff himself; but it is otherwise in case of Depositions, for there only Parties to the Suit can examine or interrogate; likewise the Reversioner or Seignioreis, (whose Tenants were only Parties in the former Suit) might themselves have bèn made Parties in a Suit in Equity. The Countess of Pembrokes Case, Hardres Rep. 472.

Do. The Depositions of a Witness taken before answer, to preserve his Testimony who dieth after Answer, shall not be given in Evidence, although he continued so Sick that he could not be examined after Answer, Hardres Rep. 315.

301 Depositions in Chancery of Witnesses that are dead may be read at the Assiles betwixt the same Parties, proving the Bill and Answer.

Do Sée Keeble 2 part 31. An old Exemplification or Depositions in Chancery given in Evidence, although the Bill and Answer were not in it, for about forty years since 'twas not usual to insert Bill and Answer.

Do The Answer of one Defendant is not Evidence against another Defendant.

Do. If Witnesses are examined de bene esse before Answer upon a Contempt, such Depositions cannot be made uls of in any other Court,

Court, but in the Court only where they were taken; the reason seems to be, because there was no Issue joyned, so as there could be a legal Examination, and they were only taken to be read in the Court in which they were taken, upon a Contempt to that particular Court, Hardres Rep. 332.

Summer Assises 1683. before View in Escape upon a Judgment, and Ca. sa. in the Court of the Dean and Chapter of Peterburrough being an Inferior Court of Pleas, the Plaintiff was non-suited because he had not a Copy of the Plaint nor Judgment, but only the short Notes of the Book of the Court. Aliter in Court Baron, &c. *Bevis* against *Holloway*.

Upon plene administravit, if it be proved that the Executor hath Goods of the Testators in his Hands, he may give in Evidence, that he hath paid of his own Mony for the Testator, to the value of these Goods, Co. Lit. 283. Dyer 2. Assets.

The Plaintiff may say, he sold the Land by the appointment of the Testator, 3 H. 6. 3.

So if a Lease be pleaded, a Lease upon Condition is good Evidence, 1 H. 8. 20. because the Genus comprehends the Species. So of a Feoffment pleaded, a Feoffment upon Condition, or a Fine which is a Feoffment of Record, is good Evidence, 44 E. 3. 39. A special Agreement is evidence for an Agreement, Plow. 8. Lease.

But if a Feoffment be pleaded in Fee, upon Issue non feoffavit modo & forma, a Feoffment upon Condition is no Evidence, because Feoffment.

because it doth not answer the Issue; and wheresoever Evidence is contrary to the Issue, and doth not maintain it, the Evidence is not good, 11 H. 4. 3. Feoffments 41. A Grant in Reversion is no Evidence, but a Lease and Release is, 20 H. 7. 5. If the Indorsement be of a Livery by Attorny, the Letter of Attorny must be shewed.

Assumpsit. Upon an Assumpsit to the Husband, an Assumpsit to the Wife and his Agrément is good Evidence, 27 H. 8. 29. Upon non Assumpsit to a special promise, payment is no Evidence per three Judges.

Challenge. In Challenge to the Array, because made at the denomination of the Sheriffs Clerk, Evidence at his Bailiffs denomination, is good, because favourably made is the substance, 38 H. 6. 9.

Assets. If the Issue be in a Suit against an Executor, Administrator or Heir, Assets in London; to prove Assets in another place is sufficient, Li. 6. 47. Dyer 271.

Accompt. Accompt pleaded before two; Accompt before one is good Evidence, Hob. 55. because the Accompt is the substance.

What Evidence upon the General Issues. Upon the General Issue the Defendant may give any thing in Evidence, which proves the Plaintiff hath no cause of Action, or which doth intitle the Defendant to the thing in question.

But if he hath cause of justification or excuse, it must be pleaded; wherefore upon Detinue. non detinet in detinue, the Defendant may give in Evidence a Gift from the Plaintiff; for that proveth that he doth not detain the Plaintiffs Goods; but he cannot give in Evi-

Evidence that the Goods were pawned to him for Mony, and that it is not paid, but he must plead it, 1 Inst. 283. For the property is in the Pledger.

Upon Not Guilty, in Battery ſon aſſault demeſne, is no Evidence; for thereby the Battery is confeſſed, Ib. Neither is Not Guilty good Evidence upon ſon aſſault demeſne. In Battery.

Upon Not Guilty, in Treſpaſs, Inſufficiency of the Plaintiffs Wounds, or to juſtifie for a Rent-Charge, Common, Licence, ſon aſſault demeſne, or the like, is no good Evidence, Ib. But to prove a Treſpaſs before or after the day laid in the Declaration is good to maintain the Action, 1 Inſt. 283. Treſpaſs. Miſtake of the day in an Appeal is not material upon Evidence.

So upon the Plea, nul Waſt fait, in an Action of Waſte, he may give in Evidence, any thing that proveth it no Waſte, as by Tempeſt, by Lightning, by Enemies, &c. But he cannot give in Evidence any juſtifiable Waſte, as to repair the Houſe, or the like; nor a reparation of the Waſte, before the Action brought, Ib. For the Rule is, That the Evidence muſt ſtand and agree with the Iſſue. Waſte.

Upon non eſt factum 'tis no Evidence to ſhew the Bond that was made upon an uſurious Contract, or that the Sheriffs Name is miſtaken, &c. in a Bail-Bond; or that the Bond is joynt or ſeveral, or delivered at another place; or that it is void by Statute. But it muſt be pleaded in Abatement, Ib. Hob. 72. Non eſt factum

But

But to prove that the Seal was broken off, and put on again; or to prove a Razure of the Deed, delivered as an Escrow, &c. this is good Evidence, Li. 5. 119. 11. 27. If 'twere done before the Action brought; but if the Seal was broke off, &c. by chance, after Issue joyned, the Jury may find it specially.

To prove the sealing and delivery of a Deed, and not know the party that did it, is not good Evidence; but if he knows the party upon sight of him it is good enough, Kelw. 59.

Trover. Upon Not Guilty, in Trover and Conversion, a Demand and denial of the Goods, is good Evidence, and an actual taking is good Evidence of the Conversion; but where the Goods come to the Defendant by Trover, there must be an actual demand and denial, Plow. 14. li. 10. 57. Cro. 1 part, ult. pub. 495. Hob. 187. More 460. Abridg. Rolls 5.

Plene administravit. Upon Plene administravit, the Executor cannot give a Judgment in Evidence, Kelw. 59. nor payment of Debts by Contract, in Debt brought upon an Obligation. A Cup pawned and redeemed with the Executors own Mony, is good Evidence; but a Recovery ought to be pleaded; upon nil debet, in Debt for Rent, That the Lessor entred into part of the Land, is no good Evidence, Goldſ. 81. But non demisit is, 9 H. 7. 3.

But an Outlawry of the Testator is Evidence upon *Plene administravit*, *Keeble* 2 part, 745.

Debt for Rent

Parco fracto. Upon Not Guilty, in an Action upon the Statute de parco fracto, That the Plaintiff hath no Park, is good Evidence, 19 H. 8. 9.

So

So upon Not Guilty, in Treſpaſs, in the Plaintiffs Warren, Evidence that he hath no Warren is good, 10 H. 6. 17. Kitchin 119. Warren.

A Shop-book no Evidence after a Year, 7 Jac. cap. 12. Shop-books.

In Debt for Arrerages of an Accompt upon Nil debet modo & forma; No Accompt is good Evidence, 2 H. 6. 26. Upon Not Guilty in Treſpaſs, a Leaſe for years, 12 H. 8. 2. or that locus in quo, &c. is the Frehold of another, 4 E. 3. 45. is good Evidence; and ſo of a Gift of Goods; but upon this he cannot juſtifie his entry upon the Place by a Strangers Licence, or Command, Br. General Iſſue 81. becauſe this is a Juſtification by way of Excuſe: Neither is a Leaſe at Will good Evidence in this Caſe. Accompt. Treſpaſs.

So upon Not Guilty, in Treſpaſs for Goods, 'tis good Evidence that the Goods were a Strangers, 9 H. 6. 11. But that they were a Strangers, and that he as Servant to the Stranger, or by his commandment, took them from the Plaintiff, is not good, Br. General Iſſue 81. becauſe the Treſpaſs is confeſſed. But that the Stranger gave them to the Defendant is good, 9 H. 6. 11. In Treſpaſs the Buttals muſt be proved as they are laid. Not Guilty in Treſpaſs.

If the Defendant plead payment to a Bond or Bill, and it appears the Debt is very old, and it hath not been demanded, nor any Uſe paid for many years, Common Preſumption is good Evidence, that the Mony is paid, and the Juries Payment by Preſumption.

uſe

use to find for the Defendants in such Cases.

Escape. In Debt upon an Escape, if the Defendant plead nul Escape, he cannot give in Evidence no Arrest.

Trespass another day. If the Trespass were in truth done the 4th of May, and the Plaintiff alledgeth the same to be done the 5th of May, or the first of May, when no Trespass was done; yet if upon Evidence, it falleth out that the Trespass was done before the Action brought, it sufficeth, 1 Inst. 283.

And so in Indictments, 3 Inst. 230.

Deed. *Keeble* 2 part, 546. Instances of a Copy not examined, allowed and disallowed in Evidence; but I think unless the Witness swear that he remembers the Contents of the Deed, and that they are as the Copy is, the Copy ought not to be allowed Evidence unless examined. 'Tis dangerous to permit Evidence to a Jury by Witnesses, that there was such a Deed, which they have seen or read, or prove the Deed by a Copy, because the Deed may be upon Condition, Limitation, or Power of Revocation; and if this should be permitted, the whole Reason of the Common Law, in shewing Deeds to the Court, would be subverted; for the Deed might be imperfect, and void, which the Witnesses could not perceive; yet in cases of extremity, as where the Deed was burned, or lost by some other notorious Accident, the Judges may at their discretion, allow them to be proved by Witnesses, lib. 10.92. and so of a Record.

Executor. In Case against an Executor; whereas the Testator was indebted to the Plaintiff, the Executor promised to pay the Debt, in consideration the Plaintiff would forbear to sue him; the Executor may give in Evidence upon Non assumpsit, that there was no Debt, or that he had no Assets tempore pro-

promiſſionis, for then there would be no Conſideration, li. 9. 94. William Banes Caſe upon the Iſſue ne unques Executor to prove an Adminiſtration granted to him, is good Evidence, Dyer 305.

Ne unques Executor. In Trover brought by an Executor, the Defendant pleaded ne unque Executor. The Defendant ſhall not give in Evidence that the Will was forged, becauſe the Will was under the Seal of the Ordinary, to whoſe Examination it belongs as to Goods; but Forgery of the Probate, or a Revocation, may be given in Evidence, becauſe theſe things are in Affirmance of the Spiritual Proceedings, ſo of an Adminiſtration, that there are bona notabilia, may be given in Evidence, but not Non compos mentis, Siderfin 359. Keeble 2 part, 337. Spiritual Courts.

Evidence. Evidence ſhall never be pleaded, but the Matter of Fact ſhall be pleaded, and if it be denied, the Evidence ſhall be given to the Jury, not to the Court, lib. 9. 9.

Evidence, that the Wife of every Copyholder, ſhall have the Land durante viduitate, will not maintain the Iſſue, that the Cuſtom of a Manor is, That ſhe ſhall have the Land during her Life, after her Husbands Death, becauſe, though durante viduitate, imports an Eſtate for Life, yet an Eſtate durante vita, is more large and beneficial, lib. 4. 30. Eſtate for life.

What may be given in Evidence. Things done before the Memory of Man in another County, or in another Kingdom, may be given in Evidence to a Jury, as Aſſets in another County, &c. More 47. See li. 4. 22. 9. 27, 28, & 34. li. 6. 46, 47.

Upon

Payment. Upon Iſſue, payment at the day; payment before or after the day, is no Evidence, More 47. but upon Nil debet, it is good Evidence, becauſe it proves the Iſſue.

Covin. Upon Iſſue, Aſſets or no Aſſets, or ſeiſed, or not ſeiſed, if one give a Feoffment, &c. in Evidence, Covin may be given in Evidence, by the other, but not if the Iſſue be infeoffed or not infeoffed, for it is a Feoffment tiel quel, though made by Covin, li. 5 60. Hob. 72.

Voluntary Conveyance. A voluntary Conveyance is not fraudulent, becauſe voluntary, but 'tis Evidence of Fraud againſt an after Purchaſer bona fide; the Statute avoids ſuch Deeds as are bona fide, and on Conſideration if made ea intentione to defraud Purchaſers, therefore this Fraud muſt be found by the Jury, Keeble 1 part, 486.

Doomeſday-book. The Book of Doomeſday brought in Court, is good Evidence to prove the Land to be ancient Demeſne, Hob. 188.

Attaint. In Attaint, the Plaintiff ſhall not give more Evidence, nor examine more Witneſſes, than was before, but the Defendant may, Dyer 212.

Court Rolls for Copy-holders. Copies of the Court-Rolls, are the only Evidence for Copy-holders, for (as Littleton, Sect. 75. tells you) they are called Tenants by Copy of Court-Roll, becauſe they have no other Evidence, concerning their Tenements, but only the Copies of Court-Rolls. But Cook explains the Text, and

Recoveries are ſome Evidence that the Manor bears an Intail of a Copyhold, but to ſhew that Remainders (after an Eſtate Tail ſpent) to be Injoyed is a better.

ſays,

says, This is to be understood of Evidences of Alienation; for a Release of a Right by Deed, a Copy-holder (that cometh in by way of admittance) may have, and that is sufficient to extinguish the Right of the Copy-holder which he that maketh the Release had.

In Actions upon the Case, Trespass, Battery or False Imprisonment against any Justice of Peace, Mayor or Bailiff of City or Town Corporate, Headborough, Portreve, Constable, Tithingman, Collector of Subsidy or Fifteen, in any of his Majesties Courts at Westminster, or elsewhere, concerning any thing done by any of them, by reason of any of their Offices aforesaid, and all other in their aid or assistance, or by their Commandment, &c. They may plead the General Issue, and give the Special Matter of their Excuse or Justification in Evidence, 7 Jac. cap. 5. Special Evidence upon the General Issue, by whom

General Acts of Parliament may be given in Evidence, and need not be pleaded; and so may General Pardons given by Parliament, if they be without Exceptions; But commonly advantage of the Act is given by the Act it self to the Offender, without pleading it, as by the late (most truly so called) general Act of Indemnity, every Person thereby pardoned, may plead the General Issue, and give the Act in Evidence, for his discharge: Which are general, and which particular Statutes, See lib. 4. 76. Statutes. Pardons.

A private Act may be given in Evidence exemplified under the Great Seal, or a Copy of the Record; but a printed Copy is no Evidence unless it be proved; it ought to be pleaded, but the Jury may find it, Dyer 239.

Trover. Upon Not Guilty in Trover, the Defendant may give in Evidence, that the Goods were pawned to him for 10 l. That he distrained them for Rent, or Damage-feasant: That as Sheriff, he levied them upon Execution, or that he took them as Tithes severed, Cro. 1 part, 157. 3 part, 435. Hob. 187. A demand and denial of the Goods is Evidence of a Conversion.

If there be two Trespasses, and the Defendant pleads a Justification; if the Plaintiff replies, *de injuria sua propria*, &c. he cannot give in Evidence a Trespass at another time; But he should have replied, that at another time, in the same day of his Count, the Defendant did the other Trespass, *&c.* to which the Defendant may plead another Justification, but the Plaintiff cannot then plead a Trespass at another time, but must conclude *Sans tiel cause*, &c. *vide apres.*

If there be two Batteries between Plaintiff and Defendant, at divers times, the Plaintiff is bound to prove the Battery made the same day in the Declaration, and shall not be admitted to give another day in Evidence, as the Case may be: As in Battery the Defendant pleaded, Son assault demesne, and the Plaintiff replyed, De injuria sua propria absque tali causa, and in Evidence, the Defendant maintained, that the Plaintiff beat him the day mentioned in the Declaration, and in the same place, which the Plaintiff perceiving, he gave in Evidence, that the Battery was

made

made another day and place, to which the Defendant demurred, upon the differnce aforesaid. Brownlow 1 part, 233. 19 H. 6. 47. But upon not Guilty, it is otherwise, though there be never so many Batteries between the Parties. Littleton, Sect. 485.

Prohibition for suing for Tythes in Bocking-Park in Essex, and surmised, that the Lands were parcel of the Possessions of the Priory of Christs-Church in Canterbury, and the said Prior and his Predecessors had held it discharged of Tythes tempore dissolutionis, and pleaded the Statute of 31 H. 8. The Defendant pleads that the Prior and his Predecessors did not hold them discharged, and upon Issue joyned thereon, the Evidence was, That the Prior or his Predecessors, time out of mind, &c. never paid Tythes; but no cause was shewn, either by unity of Possession, real Composition, or other cause to shew it discharged: Cook said it was no Evidence, for it is a Prescription in non decimando. Curia contra; for a Spiritual Man may prescribe in non decimando, and by the Statute of 31 H. 8. he shall hold it discharged as the Prior held it; and if he held it discharged, non refert, by what means; for it shall be intended by lawful means, and the Jury afterwards found it for the Plaintiff. Cro. 3 part, 2, 6. Keeble 2 part, 45.

A non decimando.

In *nil debet*, upon the Statute for Tythes, a Lay person cannot give a *non decimando* in Evidence; so may the King, and any other spiritual persons. ll. 2: B. of *Winchesters* Case.

Upon non assumpsit, in a general Indebitatus assumpsit, the Defendant may give in Evidence, payment at any time, before the Action brought, but upon a special promise

Indebitatus assumpsit.

to pay Mony, &c. it is otherwise, Causa patet; for in the first Case, if there be no Debt, the Law will infer no promise.

A Church-Book is no Evidence. *Brownlow* 1 part 207. Postea 26. Assise pl. 4.

If a Church-Book, or any thing else be given in Evidence, which ought not to be allowed, the Court above cannot quash the Verdict, except it be certified and returned with the Postea. Brownlow 1 part, 207. But the Court may order a new Tryal, upon cause shewed, as for excessive Damages, &c.

The Court will not permit the Jury to carry any Writings out with them, but what are proved, and under Seal.

But here I recollect my self, and consider that this Chapter is of greatest use to our Circuit Practiser, and therefore I shall go no farther in scatter'd Instances, but digest my farther Collections into a Method more beneficial, which may be improved by any Practiser, as other matter shall occur.

Action of the Case.

Quare defendes Crimen feloniæ ei imposuit, &c. The Plaintiff cannot give in Evidence words only, but acts, as arresting, charging or conventing him before Justice of Peace for Felony. Sanders versus Edwards, Mich. 14 Car. 2. B. R.

If any Action arises on request, as in Trover or special Promise, the Statute of Limitation goes only to the request. Juy's Case, Mich. 1652. C. B. 1 Cro. 139.

Declaration for Words spoken in the presence of A. B. and others, in Evidence it sufficeth that they were spoken in the presence of others only. Winckfield and Coot,

Lent

Lent Assises Norfolk, 1662. per Hale Chief Baron.

In Indebitatus for carrying of Herrings; the Evidence was, he was a Porter at Yarmouth, and when Herring-Ships came home, he went (of his own head) and carried up to the Defendants House, with other Porters, so many Herrings; and good by Twisden Judge of Assise, Norf. Summer 1662. Jermin vers. Lucas.

In Action for hindring to sit in a Pew, claimed by prescription, repaired, &c. ought to be given in Evidence; and one may prescribe to sit in the uppermost Seat in a Pew. Buckston and Bateman, Mich. 14 Car. 2. B. R. Pew. Keeble 2 part, 342.

In Action for executing an Illegal Warrant, &c. It's good Evidence to prove the Justice of Peace acted as such, without shewing his Commission; so on the Statute of Hue and Cry. Constables Case. Norf. Lent Assises, per Hale Chief Baron.

Action for stopping up lights, &c. One had a piece of Ground and builds an House on part, and Leases it, then he sells the other part of the Ground to one who builds on it, and stops up the lights of the first House, the Lessee has a good Action. But if two owe two pieces of Ground, and one builds, the other may also build and stop up his lights. Palmer versus Flesher, Mich. 15 Car. 2. B. R.

If a Master always gives his Servant Money to buy his Markets with, it is good Evidence to discharge the Master in an Action brought against him for Goods taken up Master.

on Truſt, by that Servant. Per Glyn Chief Juſtice, Mich. 1658. at Guild-Hall, Sir Tho. Rouſes Caſe.

Maſter. The Maſter declared, That the Defendant dug a Pit, and as he was driving his Horſe, he fell in the Pit, &c. To prove the Servant drove the Horſe doth not maintain the Declaration. Stiles 335.

A Water-courſe runs through my Ground to the Grounds of J. S. where is a Pit that time out of mind uſed to be filled with that water, I may ſtop the water in my Ground, and uſe it as I will, ſo I do not turn the courſe another way, but when I have done with it, let it fall into its own courſe. Per St. John Chief Juſtice, C. B. Suff. Summer Aſſiſes, 1657. Smart and Tyſtead.

Action for words, You forſwore your ſelf in your Anſwer in Chancery. Defendant juſtifies. Plaintiff replies, de injuria ſua propria abſque tali cauſa. Per Hale Summer Aſſiſe Suffolk, It's a good replication, and a ſmall miſtake in an Anſwer ſhall not convict of Perjury, for the Councel may miſtake or his Clerk.

Action for not ſcouring a Ditch, by which the water overflowed his Land, &c. and declare quod quidam Rivus run there, &c. Upon Evidence it appeared only a Land-flood, and good by name of Rivus, though it be dry great part of the year; and it was held the beſt pleading of the courſe of this River to put a place from whence it comes, and ſo to the Plaintiffs Land, without mentioning mean places by which it paſſes, which may be many,

many, and must be proved if laid, Per Whitfield 1641. York. Clayton 96.

Souldiers lying in an Inn fourteen days, are Guests within the Custom of England, Harland's Case, per Whitfield, 1647.

The Plaintiff in Action of the Case intitles himself by Prescription, to a Fold-course for Sheep upon all the Lands in such a Field on Michaelmas day, and so to Lady day, the Lands being unsown, and for that the Defendant put on Sheep, &c. before Michaelmas day and after, and thereby fed the Grounds, &c. the Plaintiff could not take so good feed, actio inde.

1. The Owner may put on Sheep and feed his own Grounds before Michaelmas, unless a Custom be to the contrary, which ought to be laid in the Declaration. Contra of a Stranger.

2. It appearing that part of the Lands, &c. had been the Lands of the Plaintiff, who was Lord of the Manor, and prescribed as such, and there being no exception of those Lands in the Prescription, the Plaintiff was non-suit; for as to those Lands the Prescription is gone by unity of Possession. Per Hale Chief Baron, Norfolk, Summer Assises, 1668. Branthwait versus Hunt.

Assumpsit.

In Indebitatus, Covenant to pay is no Evidence, 2 Cro. 505. Nor Mony due for Rent by specialty, or on Record. Hob. 284. Hutt. 35.

But an Account ſtated for Rent and other things, is good Evidence.

Baron and Feme.

Indebitatus aſſ. againſt Baron for neceſſaries for his Wife, they muſt be according to his Eſtate, as well as degree. Siderfin 128. If ſhe doth not cohabit with him the Action doth not lye. If the Goods bought by the Wife or Servant come to the uſe of the Husband, although this be no binding Evidence, yet this preſumptive Evidence ſhall charge him.

He may forbid one or two, &c. to let her have Goods, but a general forbidding alſo is void. Keeble 2 part, 554.

Infaney.

Per Hales Chief Juſtice, deins Age may be given in Evidence on non aſſumpſit, in an Indebitatus aſſumpſit, Keebles 2 part, 851. Painter and Bowman's Caſe.

In Indebitat. not for Mony, &c. delivery of Corn or other matter in ſatisfaction, is good Evidence. Contra in a ſpecial Action of the Caſe an Aſſumpſit. Vide Keeble 3 part, 18.

Indebitatus lyes for Mony won at Dice, Wiche's Caſe, Hill. 14, 15 Car. 2. B. R.

If a promiſe be made to pay at a day certain, and the day is paſt, the Plaintiff may declare to pay on requeſt: ſo if he declare on payment at a day certain, and give in Evidence a promiſe on requeſt, i. e. when it is created on account which gives the duty, for there the time is ex abundanti; but where the Action is founded on the Contract, otherwiſe, for there the Evidence muſt purſue the Contract. Hill. 1650. B. R. Child's Caſe.

Pro-

Promiſe to reſtore a Horſe hired for a Journy, if the Horſe dies in the Journy without the Riders default, his promiſe binds not. Liſle's Caſe, cited in Matraver's Caſe, Trin. 1651. B R.

One brings an Aſſumpſit for 20 l. and gives in Evidence a promiſe if two would ſurrender to pay them 20 l. apiece, good. Mich. 1655. B. R. Thomas and Gerey.

Indebit. for 50 l. brought by Edgar againſt Chetham Clerk. The Evidence was, T. was indebted to Edgar in 50 l. Chetham deſires Edgar to let him take the 50 l. of T. and he would give Edgar a Bill of Exchange to receive ſo much at London: accordingly T. promiſes to pay Chetham the Mony, which promiſe he accepted, and gave a Bill of Exchange to Edgar; after T. became inſolvent, then Chetham prohibits the payment of his Bill, whereupon this Action is brought. Per Wadh. Windham Juſtice Aſſiſe, Norfolk Summer 1663. The Action lies, for Chetham having accepted the promiſe of T. and given a Bill, &c. is now become a Debtor to Edgar, until his Bill be paid, though he never receives the Mony of Thomſon.

In Indebit. It is good Evidence againſt the Father, that Phyſick was delivered to his Daughter at his requeſt, Stone-houſe verſus Bodvil, Hill. 14 Car. 2. B. R.

One promiſes a Bayliff, that if he would let one Arreſted be in his Houſe that night, he would deliver him in the morning, it's a good promiſe, and the Bayliff or the Plaintiff may bring the Action. Benſon verſus French, Paſch. 15 Car. 2. B. R.

In-

Indebitat. The Case was, the Plaintiff sold sixty Comb of Rye to the Defendant at fourteen Shillings per Comb, to be delivered before Michaelmas, the Plaintiff delivered fifty Comb before the time, and brought this Action for the Mony for it, and good, though it was agreed the Mony to be paid on the delivery of the last Rye. Per Hale Chief Baron.

1. Though the Agreement is intire, yet the several deliveries make several Contracts.

2. Though the payment was to be on the last delivery, yet a time being set for delivery, it's intended to be paid when the delivery should have been.

3. The time being past, it's now a duty, and so Indebitatus lies.

4. The Defendant hath his remedy for delivering the residue. Barker versus Sutton, Lent Assise Norf. 1662.

Account. The Court would not admit Evidence of account currant to maintain Indebitatus, because 'twould involve the Court in a tedious examination; but if the Account had been stated, then Indebit. upon the Account is usual. Keeble 2 part, 781.

Indebitatus Assumpsit pro opere, or pro diversis mercimonijs, or pro servitio, or labore, is good, and the particulars may be given in Evidence: otherwise of an Indebitatus generally, or pro multis beneficis, &c. Keeble 1 part, 781. Keeble 2 part, 552.

Indebitatus lies for a Portion after the Joynture setled; so for a thousand pounds, on promise of so much for every Horse-

Shoe

Shoe Nail, but the Jury may mitigate Damages. Ib.

A promise to Marry B. within three Months, within a fortnight after they meet, and the party promises again to Marry her within three Weeks, this last promise is no discharge of the former, being all within the time of three Months; but had the last promise been to Marry her within some other time after the three Months, it had discharged the former. Hite versus Chaplin. Pasch. 1658. B. R.

Indebitatus by one, Defendant gives Evidence that another was Partner with the Plaintiff at the delivery of the Wares, Plaintiff Non-suit. Franklin versus Walker. Norf. Lent Assise 1667. Per Moreton. Contr. in Trespass, for there Joynt-tenancy must be pleaded.

In Assumpsit in Fact, and non assumpsit pleaded, a Release cannot be given in Evidence, unless only to mitigate Damages; but it may upon un Assumpsit in Law, to maintain non assumpsit.

Indebitatus for 9 l. Defendant pleaded non assumpsit infra sex annos, Issue inde, the Plaintiff proved a Debt of 9 l. due ten years before, and an acknowledgment of the Debt within six years, and an offer to pay 5 l. for the whole.

Per Hale, The Plaintiff Non-suit; for the acknowledgment of the Debt is no more than is done by the Plea, but there must be a new promise of the Debt within six years, to make the Action hold, and here the promise or offer to pay 5 l. gives no Action for

for the 2 l. Bass versus Smith, Suffolk, Summer Assise, 1668.

Debt.

Debt on a Bond to perform Covenants, to deliver possession at the Terms end to the Lessor, or his Assigns; breach was assigned in not delivery to two Purchasors, demand being made by both, and Issue joyn'd thereon, in Evidence demand by one is good. 2 Cro. 475.

Nil debet. In Debt upon a Contract, That the Contract was conditional upon Account, that there was no such Account, ne lessa pas upon nil debet, in Debt for Rent.

In Debt upon the Statute of 21 H. 8. of Farms, upon the general Issue non habuit he may give in Evidence the taking for the provision of his House, according to the Proviso of that Statute. 27 H. 8. 21.

Debt on Bond to perform an Award, ita quod the Award be delivered to the parties, in Evidence, delivery proved to the Wife, is sufficient for the Jury to presume the delivery to the party himself., Per Hale Norfolk Summer Assises, 1665. Trice and Prat.

At the same Assises, Per Moreton Justice, delivery to the parties Son is good Evidence, Violet and Cook.

Debt against an Heir, &c. riens per descent, &c. a Feoffment given in Evidence made before the Action that it was fraudulent may be given in Evidence, though not pleaded.

pleaded. 5 Rep. Co. Gooches Caſe 60. Hob. 72. Vide Fitz. Tit. Garranty 88.

Debt againſt Executor, who pleaded ne unques, &c. Plaintiff replyed, that he Adminiſtred as Executor, and gave in Evidence Adminiſtration granted to him by which he Adminiſtred, good. Dyer 305. But a Gift of the Goods the Defendant may give in Evidence.

In Debt againſt Executors, and plene adminiſtravit pleaded, the Defendant cannot give in Evidenc a Bond ſatisfied, where the Executor and Teſtator were Obligors, per Coventry Lord Keeper, 33 Eliz. Perkins verſ. Perkins.

In Debt for Tythes, Modus to a Vicar is good againſt the Parſon, and ſo is a Modus to a Pariſh Clerk. Per Moreton Juſtice, Lent Cambridge, 1667. Barber verſus Coſier.

In Debt againſt Executor de ſon tort, who pleads ne unques, &c. It is ſufficient to charge him, by proving he hath Adminiſtred of never ſo little value. Clayton 6.

Againſt Executor de ſon tort, who pleaded fully Adminiſtred, the Evidence was, the Inteſtate made a Bill of Sale of his Goods to the Defendant; who was bound with him in a Bond as ſurety, for his Counter-ſecurity, but the Goods remained in the Inteſtates poſſeſſion during his Life, for ſome few hours; ruled a fraudulent Deed by Barkly Juſtice, at York. 11 Car. Legard and Linley. Clayton 39. Quære.

Debt

If the Defendant pleads *plene*, &c. *preter* Judgments *&c.* The Plaintiff must prove Assets above the Sum of those Judgments. *Huntington*, by Judge *Windham*, 33 *Car.* 2.

Debt against Administrator, who pleaded plene, &c. and gave in Evidence Judgment, and good without pleading, per Henden, 1638. York, Clayton 65. Quære, For if Judgments be kept on foot by Fraud, and given in Evidence, how can a Creditor who sues for a just Debt, be prepared to detect this Fraud? And Note, In Scire facias against an Executor on Judgment per Testator, the Defendant pleaded fully administred generally, and the Plaintiff demurred specially, and Sir William Jones Solicitor General moved to amend the Plea; and Hale Chief Justice thought he ought to plead specially, how ful'y administred, Bradford vers. Hutchinson, H. 25, 26 Car. 2. B. R.

Debt for Rent on a Lease; the Evidence to prove the Lease was, that the Plaintiff leased a House to the Defendant at a Rent, but no time mentioned, and it was agreed at the same time, that the Lessee was not to leave it without half a years warning, per Hale, Norf. Summer Assise 1668. It's a Lease at will, and the leaving on half a years warning, is but a Collateral Agreement, and no part of the Demise.

Ejectment.

The Plaintiff Counts of a joint Lease made by A. and B. in Evidence it appeared that A. B. and C. were Joint-tenants, that C. leased to B. and that A. and B. leased to the Plaintiff, by 3 Just. against two it's good, 2 Cro. Jurdanes Case, f. 83.

Ne

Ne dona pas may be maintained by a Devise; and upon a Feoffment, a Lease and Release; but a Fine and Release will not maintain a Demise to Husband and Wife.

When he that sued an Elegit brings an Ejectment to try the Title, he must in Evidence shew the Elegit filed. Elegit.

Count of a joint Lease made by two, in Evidence it appears they were Tenants in Common, by 3 Just. against one, it's not good, 2 Cro. 166. Mantles Case.

Count of a Lease by Husband, Evidence was a Lease by Husband and Wife with Letter of Attorny to make Livery, and 'tis made in Name of both, by 3 Just. against one it's good, for Livery as to the Feme was void, 2 Cro. Gardners Case.

Of a Lease made 5 May 10. Regis habendum from Lady-day last past for 21 years, Extunc prox. sequent. In Evidence, a Lease of 5 May 10. Regis habendum from Lady-day last past for 21 years next following the date of the said Indenture, adjudged good and affirmed in Error, Hob. 19.

Ejectment of a Rectory, Evidence of the taking of Tithes only, and not Entry into the Glebe, the Plaintiff was non-suit, Latch. 62. Hems and Stroud.

The Rule to confess Lease, Entry, and Ouster doth not extend to confess actual Entry upon a Lease, that is, the Title; But the Court said an Entry shall be intended until the Contract be proved of the other side, Siderfin 223.

But

But he that makes a Lease, or an Assignment of the Lease after the Commencement, must be in possession, &c.

In Ejectment by Lessée of Lessée of the whole by many Co-heirs, which was made by reason of the incertainty of the part claimed by the Lessors, and per Cur. Lease of all Parts warrants Lease of all, Keeble 2 part, 700.

If a Trustée of a Lease be Lessor in Ejectment, his disclaimer in pais will avoid the Plaintiffs Title, 794.

In Ejectment, The Lease of a Guardian or Copy-holder will maintain the Declaration, though void against the Lord and Infant; but a Lease de Herbage, will not of Meadow, Hardres Rep. 330.

Ejectment of a Lease to A. of Lands in the possession of three Tenants for years, delivered to J. S. as an Escrow with Letter of Attorny to enter into all, and then to deliver his Déed, &c. Evidence, that the Attorny entred upon one Lessée in name of all, and delivered the Déed, &c. Per Jones Just. it's good enough, for where the Free-hold is in one, his Entry into one Lessée for years in name of all the rest is good, Latch. 71. Dame Argols Case.

Where one declares on a fictitious Lease to A. for three years, and within the same time declares of another fictitious Lease to B. of the same Lands, the last is not good. For Trespass for the mean Profits must be brought in the first Lessées Name, ut dicitur.

In

Radcliffe Trustees

In Ejectment the Defendant ſhall not give in Evidence a former Mortgage or Conveyance made by himſelf, and therefore in ſuch Cales 'tis left for him that has the former Mortgage to get himſelf made Defendant before the Cauſe comes to Tryal.

Ejeament of Tithes; a Leaſe for Life of Tithes is good, if there be Church or Church-yard to make Livery in, reſolved in Trial at Bar, Wheeler verſus Hancher, Hill. 14, 15 Car. 2. B. R. v. Jones Rep. 321, 322.

Entry and Claim made upon the Land within five years after the death of the Baron of the Countels of Peterborough to avoid a Fine, ſhe being Iſſue in Tail, proved by one Witnels, and allowed at a Trial at Bar, B. R. Mich. 15 Car. 2. Floyd and Pollard.

Cuſtom of Copy-holders in extream is to ſurrender into one Tenants Hands, in the preſence of credible Witneſſes. A Surrender was made accordingly, but preſented to be done to another Tenant, yet being proved to be done to a Tenant, it was holden by Wadham Windham Juſt. to be good: And by him, a Glove or a Turf is a Rod to give Seiſin by, Mayes Cale, Norf. Summer Aſſiſes 1663.

A Will under which Title to Land is made, muſt be ſhewn it ſelf, and the Probate is not ſufficient. Contr. if it were on a Circumſtance, or as inducement, or that the Will remain in Chancery, or other Court by ſpecial Order of ſuch Court, Eden

verſ. Chalkhill, Mich. 13 Car. 2. B. R. Keeble 1 part, 117.

Alſo Inrolment of a Deed, which needs no Inrolment, is no Evidence, ib.

How a Parſon in Ejectment of a Rectory ſhall make out his Title.

Ye muſt prove Admiſſion, Inſtitution and Induction, his reading and ſubſcribing the Articles, &c. and his Declaration in the Church of his free and full aſſent and conſent to all thoſe things contained in the Common Prayer, and this ought to be proved done within the time limited by the Statute, but need not ſhew a Right in him that preſented him.

See Keeble 2 part, 484. In Evidence an Inſtitution without Preſentation, or Copy of it, was refuſed by the Court, albeit a Preſentation may be made by Parol, but proof muſt be made of it, if there be Induction upon it; I think it good Evidence.

The Iſſue was Fine uncertain, or certain two years Rent and no more, the Evidence was of admittances on Surrenders uncertain, but all under two years Rent. Per Williams Juſtice, You ought to produce Fines on Deſcent, and Fines paid above two years Rent, 2 Bulſt. 32. Allen verſus Abraham.

A Leaſe was made by parol and agreed to be put in Writing, and Indentures beſpoke, but being held for ten years, and no Indentures executed, it was ruled for a Leaſe parol, Per Barkley Juſt. 13 Car. 1. York, Clayton 53.

By Juſt. Berkley (1638. York, Hedges cont. Clayton 57.) A Will under Seal, proved, examined by the Original, was allowed good Evi-

Evidence. Quære, I think the Practice against it.

A Lease and Release were given in Evidence to entile the Plaintiff, and they both were named hæc Indentura, but were not indented: Good, Per Hales Chief Baron, Norf. Summer Assises 1668. Briant versus Trendle.

After default (in Ejectment) the Defendant may confess Lease, Entry and Ouster, and may give Evidence, and have all advantages (except Challenges) and if the Plaintiff becomes non-suit, any one for the Defendant may pray it be recorded.

Per H. Wyndham Just. Bucks Lent 68. Dr. Crawlys Case. Deprivation in Spiritual Court for Simony disables from bringing Ejectment, because he can make no Lease; yet quære.

If Mortgagor continues in possession without provision for that purpose in the Deed, he is Tenant at Will, and if he levies a Fine it's no Disseisin by him continued in possession still, because after the Will determined he is Tenant at sufferance, Per Hale Chief Baron, Bedford Summer Ass. 1669.

Declaration on a Lease made 14 Jan. 30 Eliz. Evidence of a Lease sealed 13 Jan. good, for if it was a Lease 13. it was a Lease made 14. 4 Leon. 14.

If the Declaration in Ejectment be of Michaelmas-Term which relates to the first day of the Term, yet 'tis Matter of Evidence, and examinable what day the Bill

was filed, and if 'twas after the day of the Leaſe, all is well, Siderfin 432.

Feoffments of 40 years ſtanding, and poſſeſſion going accordingly, you need not prove Livery, it may be intended per Jury, Rolls Rep. 132.

The Common Rock on which ſo many have ſplit, is laying the Leaſe to be a die datus, and the Entry the ſame day, which is a Diſſeiſin, not purged by the Commencement of the Leaſe, for where an Intereſt paſſes [à] is excluſive, and ſo the Entry the ſame day, is before the Leaſe was to Commence, and is a Diſſeiſin, but in caſes of Obligation where no intereſt paſſes, it is contra, quod nota.

Treſpaſs.

Count of Treſpaſs done in one Acre, Evidence of Treſpaſs done but in half that Acre, good, 2 Cro. Winkworths Caſe.

The Lady Hatton brought Treſpaſs for breaking her Cloſe, and taking away her Horſe, &c. againſt two Defendants, they plead Not Guilty, as to the taking of [Her] Horſe, as to the reſt, they ſay that the Horſe of one of the Defendants was in the Cloſe, &c. and they took him out doing as little damage as they could, quæ eſt eadem &c. The Plaintiff replies de injuria ſua propria, &c.

The Evidence was, That the Plaintiff as Lady of the Mannor took the Horſe as an Eſtray, and it was cryed and marked, &c. that the Defendants refuſed to pay for the

Meat

Weat, and took him away, before the year and a day was out.

1. Per Wadh. Wyndham Just. d'Assize, A Lord may detain an Estray for Weat, yet no Trespass lies if the Owner takes him, but an Action of the Case lies for the Weat.

2. If the Action had been brought against the Servant only, he must justifie, &c. But being brought against Master and Servant, this joint-justification is good.

Cambr. Summer Assises 1667. Lady Hatton against Cotes and al.

In Trespass, the Evidence for the Defendant was, That the Defendant had a Barn, and purchased a Way over the Plaintiffs Land to that Barn, after the Defendant bought other Lands lying contiguous to that Barn on the one side, and to a Haven on the other side, and carried Carriages by that way to the Barn, and through it over his own new purchased Land to the Haven. Per Hale Chief Baron, If I purchase a general Way to such a place, I may go from thence on my own Ground whither I please, though I purchase the Ground after the Way purchased, Summer Assises Norf. 1665. Heynsworth vers. Bird.

Trespass was brought against many, by a School-mistress, for taking away a Child (her Scholar) with a Scarf of the Mistresses; per Keeling Ch. Just. In Trespass for taking [things] all are Principals that are present and consenting; Contra, in taking [Persons] And this Action lies not by the Mistress for the Child, but for the Scarf

only, Lent Norf. Aſſ. 1663. Mary Coopers Caſe.

Treſpaſs lies for Leſſee in Ejectment on a fictitious Leaſe to recover mean Profits during the continuance of that Leaſe mentioned on Record: And the Recovery ſhall maintain it. Otherwiſe if brought by the Leſſor, for he is no Party to the Action.

But ſee Siderfin 239. If a Recovery be in Ejectment, and afterwards Treſpaſs is brought for the mean Profits before the Leaſe, nothing ſhall be given in Evidence but the value of the Profits, and not the Title, for otherwiſe Trials would be infinite.

Alſo if it be between the Parties the Record is an Eſtoppel; and ſo the Court held it ſhould be if it was againſt under Tenants.

But quære if the Defendant be one that has a Title, if he cannot give this in Evidence, for otherwiſe it would be a great miſchief.

Treſpaſs lies not for pulling down a Pew in a Church faſtned to a Pillar with a Chain. Contra, had it been fixed by Nails driven into the Pillar, Per Glyn Ch. Juſt. Trevors Caſe.

Treſpaſs quare fregit liberam Warrenam ſuam, and took his Conies. In Evidence it appeared that the Plaintiff had liberty of Chaſe in the place, which though it includes Warren; yet a general Treſpaſs lies not, but an Action of the Caſe, E. of Arundels Caſe, Paſch. 1658. B. R.

Per

Per Earl Sergeant, If Beasts be impounded, and the Key lost, the Officer by Replevin may break the Pound, and deliver the Cattle, per Stat. Marlebridge, 52 H. 3. 21.

Tenants in Common must join in Trespass done against them, so Avowry, Lead and Lamsteads Case, 7 Car. B. R. cited by Finch in Argument. Or Tenant in Common surviving shall have Trespass.

In Trespass, The Defendant sets forth a conditional Feoffment for payment of Mony at such a day and place, and that he paid it accordingly; Issue joined on the payment at the day and place, Evidence of payment before the day is not good. Contra, had the Special Matter been pleaded with acceptance, More 47.

In Trespass with Continuando to recover mean Profits, an Entry and Possession of the Land before the Trespass must be proved, and also another Entry after the Trespass.

In Trespass, the Defendant prescribes to dig in the Common for Clay, to repair antient Houses holden of that Manor, and good, Berney vers. Stafford, Norf. Lent Assises 1667.

In Trespass they were at Issue on Not Guilty, and at the Assises the Defendant left his former Plea, and pleaded an Accord with satisfaction, the Judge would have had it replied to and tried presently, but the Councel refused, whereupon the Jury was sworn, and the Plaintiff nonsuited, Bedford Assises Lent 1667. Green versus

Reynolds. But this was contrary to the Opinion of Sir Orlando Bridgman, at the ſame Aſſiſes, and contrary to 10 H. 7. 21. and 1 Bul. 92.

Treſpaſs lies by Recoveror in Erroneous Judgment for a mean Treſpaſs, becauſe the Plaintiff in Writ of Erroz recovers all mean Profits, and the Law by fiction of relation will not make a wrong-doer diſpuniſhable, 13 Rep. Co. 22. but Contra, where Act of Parliament reſtoreth, &c.

Treſpaſs for Aſſault and wounding in Suff. the Defendant as to vi & armis non Cul. As to the other juſtification of molliter Manus, &c. in Norf. and ſeveral Tryals, Per Hales Ch. Baron, Suff. Aſſ. Summer 1668. the vi & armis can't be tried till the other be tried. Contr. If the firſt Iſſue of non Cul. was as to the wounding; and by him Evidence of Livery of Seiſin, generally ſhall be intended for life only.

Son aſſault demeſne.

The Defendant proved the Plaintiff threatned the Defendant by ſaying, Were it not Aſſiſe time, he would tell more of his mind, which he ſaid, bending his Fiſt, and with his Hand on his Sword, yet per Cur. This is no Aſſault, as it would be without that Declaration: But it was farther ſworn the Plaintiff with his Elbow puncht the Defendant, which if done in earneſt Diſcourſe, and not with intent of Violence is no Aſſault, nor then is it a Juſtification of Battery after a Retreat, Keeble 2 part, 545.

The

The Hogs of B. were put into the yard of A. and broke into the Land of C. and did Treſpaſs, Action lies againſt A. though the Servant of B. did look to them and ſerve them, by which the Owner had the ſpecial Poſſeſſion of them. So if agiſted Cattle do Treſpaſs, the Agiſtor ſhall anſwer, Dawtry verſ. Huggins, Clayton 33. per Barkley, 11 Car. York.

A. by Indenture of Uſes raiſed an Eſtate to B. in Fee, who regrants Turbary to A. be another Deed, and after A. levies a Fine to confirm the Eſtate and Uſes aboveſaid declared; this doth not touch the Turbary, per Vernon, 11 Car. York, Clayton 42.

Any one imployed by an Officer, is an Officer within 7 Jac. 5. to plead general Iſſue, and give the ſpecial matter in Evidence, Clayton 54.

Preſcription to Tether Equos & Boves upon ſuch a Balk, &c. Mares and Cowes, good Evidence within that Preſcription, Per Barkley, Clayton 54.

Per Hale, A Corporation may Bargain and Sell, though it has been thought an Uſe upon Uſe, they being ſeiſed to the uſe of their Houſe: But I think it rather a Truſt than an Uſe.

If a Juſtice of Peace ſend his Warrant to J. S. (who is no Officer) to bring one before him, if J. S. be no Officer, he is not bound to execute it, yet if he does execute it, it's good, and he may execute it in any part of the County. And ſo a Conſtable of one Town may execute a War-

Warrant in any other Town in the same County, and any such Warrant is as large as the Justices Commission is, per Hale Norf. Summer Assises 1668. Wrongries Case.

In Trespass against one for Gleaning on his Ground, per Hale Norf. Sum. Assises 1668. The Law gives Licence to the Poor to glean, &c. by the general Custom of England, but the Licence must be pleaded specially, and can't be given in Evidence on non Cul.

In Trespas quare Clausum & Domum fregit Et alia enormia ei intulit, after Verdict for the Plaintiff and 60 l. Damages, 'twas moved for a new Tryal by reason of excessive Damages, and upon Affidavit that the Jury intended great part of the Damages for the Injury the Defendant did to the Plaintiffs Daughter, &c. which came in under the & alia enormia, the Plaintiff had Judgment; and a difference was taken, that Damages ex turpi causa may be given in Evidence under this General Clause, Et alia enormia, but from nothing else, Siderfin 225. Sippora versus Basset.

Trover.

The Citizens of London gave in Evidence their Custom to take Toll, Jones 240.

In Trover, for an Horse proved of 15 l. value, the Jury gave but 3 l. Damages, upon mistake, they thinking that the Plaintiff had his Horse again.

Per

Per Wadh. Wyndham; If the Jury had not been gone, they ſhould have mended their Verdict; but a new Action of Trover lies for Damages for the Horſe, in which the Jury ſhall prove the 3 l. given was only for the Converſion, not the value of the Horſe; and by him, Trover lies for Goods in the Plaintiffs poſſeſſion, to recover Damages for the Converſion only, Tyndal verſ. Jolliffe Norf. Lent Aſſiſes 1660.

In Trover by Adminiſtrator where the Converſion was in the time of the Inteſtate the Plaintiff muſt ſhew the Letters of Adminiſtration. Contr. where the Converſion was after his death, Per Hale Norf. Sum. Aſſ. 1660.

If an Eſtray be claimed within the year and the day, &c. and the Lord refuſes to deliver it; Trover lies, though the keeping is not paid for, and the Lord ſays he detains for the ſame; and the Lord can't detain for the Neat, &c. but muſt bring his Action, Per Moreton Juſtice Lent Norf. 1667. Boyd verſ. Paſton, Quære: vide Dent Tit. Treſpaſs per Wyndam contr. and I think is Law, Vide Rolls Tit. Eſtray 889.

At the ſame Aſſiſes Daniel verſus Berney, by Moreton Juſtice, Proclamation may be made of an Eſtray by any Perſon, and it is not neceſſary that it ſhould be made by the Bell-man or any other Officer, Vide Co. Entries 170. Barber verſ. Fawcet. In Trover, Iſſue was joined on tender of amends for keeping, &c. and Verdict pro Plaintiff and Judgment.

Note,

Note, I find Precedents, that in Trover, the matter of an Estray may be pleaded specially, or given in Evidence on Not Guilty.

Oats were taken from the Owner, and carried to a Miller to make into Oatmeal, and before it was done, the Owner prohibits the Miller, &c. and demanded the Oats, who, notwithstanding, made them into Oat-meal, Per Barkley it's a Conversion in the Miller, 1638. Clayton 57. Holfworths Case.

On non Cul. The Defendant gave in Evidence, a Seizure for Goods Foreign bought and Foreign sold. Per Custom of Lynn Norf. good, per Hale Norf.Sum. Ass. 1668. Harwich vers. Twells.

A Man lends his Horse to a Special Purpose, the Bailee abuses the Horse, and over works him, then the Lender takes the Horse again. Per Hugh Wyndham Justice Lent Assises Bucks. Trover lies not, Constables Case.

Dower.

In Dower, the Issue was ne unque seisie que Dower, and for the Plaintiff, a Feoffment in Fee was given in Evidence to the Husband, the Defendant would have given in Evidence, a Seisin in Tail with a Discontinuance, and then the Feoffment, &c. and so a Remitter, but it ought to be pleaded per Cur. Dyer 41. Nor an Estate upon Condition.

If an Heir Mortgage for years, and then assign Dower legally i. e. a third part of the whole, the Assignment shall bind the Mortgagée; Contr. if the Assignment be illegal, as of one whole Manor when there were three Manors; that being not as the Law would have done it. And if a Disseisor assign a legal Dower, it's good: But if the Heir Mortgage in Fée, and then assign, &c. legally, &c. that is not good, because the whole Free-hold was out of him at the time of Assignment, per Hugh Wyndham Justice, Bucks Lent Ass. 1668.

Account.

Against S. as Receiver of two 30 ls. and as Bailiff for receiving his Rents for several years, not saying any certain Sum of Rents: Per Earl Sergeant, The proper way is to find quod Computet, as to what is certain in the Declaration and so proved, as the Pony was, but not to the Rents, and so he said was the Opinion of Hale. But per Moreton Justice, the Verdict shall be general, and it may be both ways, Sayes Case, Norf. Lent Assises 1667.

Thus far I have made an Essay of a Method to be farther built upon by our Practiser, and have given some Cases, not in Print, and (it may be) useful. I shall add some other Cases, not so proper for Heads, except that of [Evidence] with which I shall conclude this Chapter.

Evidence.

Evidence.

Inſpection of a Deed inrolled may be given in Evidence, Contr. of a bare Deed not inrolled, or of a Deed that needs no Inrolment, Paſch. 1655. B. R. Goodſons Caſe.

An Inſpeximus lieth only of Matter of Record, and not of a private Deed, Keeble 2 part, 294.

A Deed to lead the Uſes of a Fine was inrolled on the acknowledgment of but one of the Parties to it, and was allowed by Glyn Chief Juſtice in Evidence, as Roll Chief Juſtice had done before him, though no binding Evidence, Turber verſ. Maddiſon Paſch. 1655. B. R.

An Office found at a Death, &c. may be given in Evidence.

A Verdict againſt one, under whom either Plaintiff or Defendant claims, may be given in Evidence againſt the Party ſo claiming. Contr. if neither claim under it, Duke and Ventres, Mich. 1656. B. R.

If an Action be brought on a Statute, which has ſeveral Proviſoes in it, the Defendant may plead Not Guilty, and aid himſelf by any of the Proviſoes in Evidence; But if Proviſoes be made to that Statute, of which the Defendant may take advantage, he ought to plead it, and not give it in Evidence, Per Roll Chief Juſtice, Mich. 1650. B. R. Jones 320. accord.

Join-

Jointenancy in Treſpaſs cannot be given in Evidence; but muſt be pleaded in Abatement, Jones verſ. Randal, Hill. 1652. C.B.

Arreſt and Impriſonment to prove a Bankrupt muſt be proved by Record, Newby verſ. Bathurſt, Paſch. 1659. B.R. In a Trial at Bar, what Evidence proves a Bankrupt, Keeble 2 part, 487. Bankrupt.

The Cuſtom of New-England to marry by the Magiſtrate in the preſence of a Miniſter, was allowed good by Hale Chief Juſtice B. R. Trin. 1663. at Guild-hall, int. Hall & Hall.

The Certificate of the King under his Sign Manual was allowed in Chancery for proof without Exception, Hob. 213.

Records, as Patents, Statutes, Judgments, may be given in Evidence, Hob. 227. contr. to Dyer 129.

To prove an Extent upon a Statute or Judgment, you muſt prove a Copy of the Statute and Judgment, as well as the Copy of the Writ and Extent.

When Records are pleaded, they muſt be Sub pede Sigilli, contr. if given in Evidence, Stiles 22. Whites Caſe.

An Anſwer in Chancery, is Evidence againſt the Defendant himſelf; but the Bill muſt be proved, Godb. 326.

If the Party make Oath that he cannot find his Witneſs, then he is as it were Dead, and his Depoſitions in an Engliſh-Court may be given in Evidence betwixt the ſame Parties, Godb. 327. Not only the Plaintiff, but any Stranger may give the Defendants Anſwer in Evidence againſt the

the Defendant, but not against others, Siderfin 221. A Bill in Chancery given in Evidence against the Plaintiff himself, where there are Procedings upon it, Keeble 2 part, 499.

Upon a Traverse of a Lease parol for years, viz. Absq; hoc quod A. demisit, &c. Nihil habuit in tenementis, may be given in Evidence, Dyer 122.

Shewing a Grant to dig Turfs, is no Evidence against a Prescription for the same, but the Grant being the same with the Prescription, shall be taken as a Confirmation, Crew & Vernon, Moor 819. Quære tamen, vid. Moor 830. Where a Court of Pipowder is claimed by Prescription and Grant, and good, 2 Cro. 313. Acc.

In Trespass for taking Goods after Judgment, per confession, non sum informatus, or nil dicit, Property need not be proved to a Writ of Inquiry, for it would oppose the first Judgment, Quod querens recuperet, and the Judges might have assessed Damages if they would, Yelv. 151. Yet quære, If the Defendant may not disprove Property in mitigation of Damages; for the Jury may find no Damages.

A Copy of a Deed, is good Evidence where the Defendant has the Deed, and will not produce it, Per Vernon Justice, Clayton 15.

So that there was a Revocation, is sufficient for the Heir, without shewing the Deed it self, which was taken away by the Defendant, so that the Witnesses to the Re-

Release proved the Lease without shewing, being taken away by the other side.

A Deed of Feoffment without Livery may be given in Evidence as a Release, Per Berkley, 11 Car. Clayton 32.

If a Fine be given in Evidence, with five years non-claim, &c. the Fine must be shewed with the Proclamations under Seal, and the Cirograph will not serve.

The Confession of a Party must be taken whole, and not by parts; As if to prove a Debt, it be sworn that the Defendant confessed it, but withal he said at the same time, that he paid it, his Confession shall be valid as to the payment as well as that he owed it, Per Hale Chief Justice. And so is Common Practice.

A Deed cancelled by Practice, was allowed to be read, in Evidence in Action under that Deed, the Practice being proved, Hetley 138.

Against a Purchasor bona fide, recital in a Deed of Mony paid is not sufficient, nor Acquittance for the Mony, unless it be of ancient standing, and then it shall be presumed.

The Deed to lead the Uses of a Fine sur conceßit, need not be proved per Testes.

If a Deed of Feoffment be shewn, but no Livery, Possession going with the Deed, is Evidence to a Jury to find Livery.

At Guild-hall, Trin. 23 Car. 2. Hale Chief Justice cited the Case of Sir Paul Pindar, A Levari, &c. was proved by a recital of it in another Record, and Hale and Mainard demurred on the Evidence, and adjudged against

them, for this Cause, viz. That it was proved there was such a Record, that it was filed, that it was taken off the File. But (by him) generally without such proof, the Evidence is not good, because one Record may recite one that never was.

The Jury are to decide the Fact, and Evidence is not given but to inform them in their Consciences of the truth, for although no Evidence is given of either side, yet they may give their Verdict of one side or the other. 14 H. 7. 29. And therefore although two Witnesses are necessary, where the Tryal is by Witnesses, as in the Civil Law; yet they are not of necessity where the Tryal is by Jury. And where Witnesses are joyned with the Jury, yet they may be rejected, if they will not agree with the twelve, and the twelve may give their Verdict.

Office of the Jury.

The Jury after they are departed from the Bar, may return to hear their Evidence of any thing they doubt before the Verdict.

Done in Tayle.

Sur Travers de done in tayle, the Witnesses prove, That another made the Done; this doth not warrant the Issue.

Extortion *vers. vic.* Fee.

In an Action against the Sheriff upon the Statute of Extortion, that he took it for Barr-fee of one who was acquit, is good Evidence.

Possession.

Possession is an Evidence of right, and he that hath possession may distrain the Cattel of him that hath no Title, for the taking is in respect of the possession, more than of the title.

In

In Debt for Rent upon a Leaſe, and nil debet pleaded, ne unques ſeiſie de terre is good Evidence, otherwiſe upon the Plea of riens arrere, or levy per diſtreſs. Debt for Rent.

A Receipt of the laſt half year is Evidence that all before was paid.

Eviction or expulſion may be given in Evidence upon nil debet in an Action of Debt for Rent.

Parſon or not Parſon, in ſuch Iſſue you may give in Evidence a reſignation, although it be in another County and Spiritual. Parſon.

In riens paſſe per le fait, Not his Deed may be given in Evidence. Fait.

In Treſpas, quare clauſum fregit, with Abuttals, all the Abuttals and deſcriptions muſt be proved. But if the Abuttal be laid North, &c. and it incline North, though not directly, it is ſufficient: & ſic de cæteris. What ought to be proved in Evidence. Abuttals.

Upon this Iſſue, the account given to the Ordinary, ſhall not be given in Evidence, nor any reſpect had to it. *Plene Adminiſtravit.*

That the Executor paid a Legacy, is Evidence that he had Aſſets.

Will. The Probate is good for the perſonal Eſtate, but not to prove a Will in Writing of Land by the Statute. What ſhall be given in Evidence, and what is good Evidence.

Recital of other Grants by Letters Patents, in Letters Patents, are ſome Evidence, but not fit to be allowed, without ſhewing the former Letters Patents or a Copy. But the Jury may find them. Recital in Letters Patents.

The proof of this ſurmiſe in any Court of Record, ſhall not be given in Evidence Surmiſe in a Prohibition.

in another Action, upon the same custom, because the Defendant in the Prohibition cannot cross examine.

Depositions. Depositions in the Court Christian, in the Court of the Council of York, touching the title of Land, of which they have not conusance, or in another Suit against him, who claimeth not under those parties, by the Commissioners upon a Commission of Bankrupt, because the party could not cross Examine, shall not be allowed in Evidence. But see Keeble 2 part, 348.

Littletons Rep. 167.

Sentence. But a sentence given in the Spiritual Court touching Tythes, may be given in Evidence in an Action at Common-Law, for this is a judicial Act.

Coslom. To lay a custom to a House and Land, to prove it to Land only, not good. Godbolt 234.

Recusant. The Record of Conviction of Recusancy being burnt, may be proved by the Roll of Estreats of the Clerk of Assise, signed by the Judge and delivered into the Pipe, or by other Evidence (as a Fieri facies, &c.) may be proved by other Evidence.

Fraud. A Voluntary Conveyance is not fraudulent, because voluntary; but it is a great Evidence of Fraud against a Conveyance made bona fide, and therefore this Fraud must be found by the Jury. Keeble 1 Vol. 486.

Church. 'Tis good Evidence to Convict one upon the Statute Eliz. for not coming to Church, to prove that the party was not at his Parish Church, such a Sunday, and the party may shew that he was at Church elsewhere.

After

After Evidence given, and the Jury ready to give their Verdict; and then the Attorny General will not proceed, but draws a Juror, and brings another Information, none of the former Jurors shall be admitted to give in Evidence, that the Jury were ready to give their Verdict against the King in the first Information, for this ought not to be discovered, for so no benefit would accrue to the King by his Prerogative to draw a Juror. Former Tryal.

But this may be given in Evidence in another Action, where the King is not concerned. What may be given in Evidence upon a special Issue.

In Debt for Rent upon non dimisit, that the Lessor riens avoit in the Land at the time of the Demise, may be given in Evidence. Debt for Rent.

So upon Nil debet an eviction may be given in Evidence. If the Lessor enter into part, the whole Rent is suspended; but if a stranger evict the Lessee of part of the Land, the Rent must be apportioned.

Upon an Issue of Common appendant, &c. common per cause de vicinage, cannot be given in Evidence. Common.

If the Defendant plead son assault demesne, in Battery, and the Plaintiff reply, de injuria sua propria absque tali causa, and so Issue is joyned, if there was a battery at another day, than what the Plaintiff and Defendant have assigned upon the Plaintiff, and another upon the Defendant by the Plaintiff, the Verdict ought to be for the Defendant; for if the Defendant prove any Assault made upon him by the Plaintiff, this ought to be found for him, although it was at another day than Son Assault Demesne in Battery.

what he hath alledged, for the day is not material: but upon such special justification the Defendant hath liberty to prove his Plea at any time, and the Plaintiff might have made a new assignment at another time, for peradventure there might be several Trespasses at several times, to which the Defendant may have several Pleas, and therefore if such manner of pleading should not be allowed, and such Evidence, the Defendant could not tell how to help himself, nor could know for what Trepals the Action is brought. Vide devant hic & apres cap. 13.

Surrender. If the Issue be whether the Kings Tenant by Letters surrendred to the King or not, the accepting of new Letters Patents, which is a surrender in Law, is good Evidence.

Non assumpsit. In a special promise to pay 20 l. if the Plaintiff would pay 10 l. &c. and an averment that he paid the 10 l. Upon non assumpsit, the Defendant shall not give in Evidence that the Plaintiff did not pay the 10 l. neither is the Plaintiff bound to prove it, for the Issue is upon the assumpsit, and not upon the payment of the 10 l. which might have been traversed. And although 'twas said, That in all Actions there is a general Issue to be taken, which shall put all the Declaration in Issue, and that must in this be non assumpsit, or nothing, yet by the advice of all the Justices of Serjeants Inn in Fleetstreet, it was ruled as abovelaid. Mich. 16 Car. B. R. between Holditch and Broding. I have been the more particular in this, because I have known Plaintiffs non-

non-suited in such Cases at the Assises for want of proving the averment: although I must confess I never agreed with the Judge herein that did it. For it is a mistake to say, The Plaintiff must in all cases prove his whole Declaration; if he proves the matter in Issue, he ought not to be non-suited. Rolls tit. Tryal, 1681.

Grant per fait Where it is sufficient to prove the effect of the Issue.

If an Advowson be pleaded to be granted Per fait, and this Issue is taken by a stranger to the fait, if it be found granted sans fait, or by another fait it is good, for the Deed is surplus, and the effect of the Issue is upon the grant, not upon the fait.

Dures.

If an Imprisonment by Dures at D. be in Issue, 'tis not material whether he was ever at D. or not, for the effect of the Issue is, if the Deed was made by dures.

Feoffment.

So of a Feoffment pleaded by Deed, a Feoffment without Deed, or another Deed is good, for the effect of the Issue is upon the Feoffment, not upon the fait.

Fresh Suit. Escape. The Writ, the Warrant, Arrest and Escape are to be proved in an Escape.

In Escape of a Prisoner, and the Issue is, if the Gaoler immediately after the escape made fresh Suit, if the Prisoner hath escaped a day and night before the Gaoler knew it, and then he makes fresh suit, it is sufficient to prove the effect of the Issue, for convenient pursuit is immediate fresh suit in Law.

In Escape against the Marshal the Plaintiff must prove the person that escaped in actual custody since the Committitur, which Committitur either in the Marshals Book, or on Record is not sufficient, without a proof of being in actual custody since. Keebles

1 Vol. 375, 775. See Keebles 2 part, 384. What may be given in Evidence upon an Information of negligent Escape, against the Marshal of the Kings Bench, as a Recovery in the Original Action, and the Plaintiff allowed a Witness, because he neither gains nor loses.

Non demisit modo & forma.

If in pleading an Indenture of Demise you mistake the recital, and the Issue is non demisit modo & forma; The mistake shall not hurt, for the effect of the Issue is upon the demise.

If the date or number of years be mistaken, 'tis fatal.

What things may be given in Evidence upon the general Issue.

If a Man plead Not Guilty, he cannot give in Evidence a matter justifiable, which shall be a confession of the Act, for this is contrary to the Issue. As son assault demesn in Battery upon Not Guilty: but upon Not Guilty in Trespas for beating ones Servant, per quod servitium amisit, you may give in Evidence, that the Plaintiff did not lose his Service by the Battery.

Trespas.

Battery.

Wast.

Nor upon nul wast fait, can he say, suficientment repair devant le brief purchase.

Servant.

If my Servant without my consent put my Cattel in the Land of another, I may plead Not Guilty, and give this matter in Evidence; for by putting the Cattel in, the Servant has gained a property.

Information.

Upon Not Guilty, he may give in Evidence a discharge by a Proviso in the same Statute, for thereby he is Not Guilty, Contra formam Statuti, but not a Discharge by another Statute.

Upon

Upon non habuit ſeu tenuit ad firmam contra formam Statuti, the Parſon may ſay, he took the Farm for maintainance of his Houſe, according to the Proviſo in Debt upon the Stat. 21 H. 8.

But upon the Statute 5 E. 6. for ingroſſing, upon Not Guilty, 'tis ſaid, That the Defendant cannot give in Evidence a Licence according to the Proviſo of the Statute. ſed quære rationem.

Upon ne unque ſon Receivor, &c. the Defendant cannot ſay that he paid the Mony according to directions, &c. Account.

In a Scire facias againſt Tertenants and a Feoffment pleaded before the Judgment abſque hoc, that he was ſeiſed Tempore Judicij, and Iſſue upon the ſeiſin, that the Feoffment was fraudulent, to defraud the Judgment, may be given in Evidence; but otherwiſe, if the Iſſue had been upon the Feoffment. Seiſin. Feoffment.

So upon riens per diſcent, by an Heir in Debt upon an Obligation, That the Defendant aliened the Aſſets by fraud and covin, and ſo void by the Statute of 13 El. may be given in Evidence, becauſe theſe are the general Iſſues. Riens per diſcent.

In Treſpaſs for taking a ſtack of Corn, the Evidence may be of part, and the Verdict as to four Combs or Buſhels, Guilty, and as to the reſt, Not Guilty. Parcel.

In an Information for Writing, Printing and Publiſhing a Libel, That Copies were found in the Defendants Chamber, is no publication, without diſcourſing it or delivery of it out. Keeble 2 part, 502. Libel.

If

If in the Evidence it appear that the Bill was filed afterwards, nothing that the Defendant had in his hands, and paid before the filing of the Bill shall be Assets, for otherwise there might be great inconvenience.

Plene administravit.

Upon this Plea the Executor may give in Evidence a retainer for a Debt due to himself of as high a nature; or payment of Debts with his own Mony, and that he kept Goods of the Testator in lieu; for this alters the property.

The Original need not be shewed in Evidence upon this Plea, nor upon the Issue Assets at the day, &c. because the day is agreed in pleading. Yet see Siderfin 432.

What Evidence the Jury may have with them.

They can have nothing but what is delivered to them in open Court, and given in Evidence by the Party in Court, if an Exemplification come out of Chancery of Witnesses examined there upon Oath, who are dead, the Jury shall have this with them; but if the Exemplification comprehend some Witnesses alive and some dead, they shall not have it with them. Neither shall they have any Pedigree drawn by a Herald at Arms, for it is no Evidence, only information for direction. What Evidence the Jury may have with them, see the 14th Chapter.

Exemplifications.

Pedigree.

Not an Office before an Escheator, unless exemplified, nor a Testimonial, nor a part of a Fine indented unless exemplified, but they may find the same specially.

If

If a Man makes a Feoffment and afterwards makes another, with Covenants that he was seised, &c. and afterwards an Issue is taken upon the first Feoffment, the Feoffee shall not be a Witness. Who may be Witnesses. Not persons interested either in Law or Equity, in *presenti* or *futuro*.

In an information for Usury, the party shall not be a Witness, because he would thereby avoid his own Bonds, &c. and be testis in propria causa. Usury.

In case of Forgery, Perjury and Usury, the party grieved may have advantage by the Verdict, and therefore shall not be received as a Witness; but in Case of an Indictment for Battery, he that was beaten may be a Witness, because he can reap no benefit by the Verdict in another Suit. Hardres Rep. 331.

Three Men swear an Arbitrement in three several Actions against them, upon the Statute 5 Eliz. of Perjury, each of them may be a Witness for the other; but in an Indictment of Perjury upon 5 Eliz. the party grieved shall not be a Witness, for he is to have 20 l. Perjury.

Conventicle of thirty or forty is evidence of Terror, &c. Keeble 2 part, 558. Terror.

Common experience tells us upon an Indictment for Battery, &c. the party grieved may be a Witness, because 'tis only for the King.

In an Action against the Hundred upon the Statute of Winton, &c. the Lessor living out of the Hundred may be a Witness, for 'tis not reason that he and his Lessee being an Inhabitant should be both charged: If the Servant be robbed of the Masters Money, the Hundred.

the Master may be a Witness to prove the delivery of the Pony to the Servant before the Robbery. Rolls Tit. Tryal, 686.

Proceedings in Ecclesiastical Courts.

A thing which is concluded in the Ecclesiastical Court concerning Lands, is not to be given in Evidence to Juries, for the Courts of Common Law are not to be guided by their proceedings. Mich. 22 Car. B. R.

Matter in Law. Vaughans Rep. 143.

Matter in Law is not to be given in Evidence, for the Jury are only to try matters of Fact. The adverse Party may demur to such Evidence. 3 H. 6. 36.

Ancient Writings.

An ancient Writing that is proved to have been found amongst Deeds and Evidences of Land, may be given in Evidence, although the executing of it cannot be proved, for 'tis hard to prove ancient things, and finding them in such a place, by presumption, they were honestly and fairly obtained and preserved for use, and are free from suspition of dishonesty. 24 Car. B. R.

Totum & pars.

A Writing or Answer permitted to be read in part, may be read in toto.

Copy of Records.

A Copy of part of a Record cannot be given in Evidence, unless 'tis proved that the part shewed in Evidence is all concerning the matter in question.

Transcript Enrollment.

A Transcript of a Record or Enrolment of a Deed may be given in Evidence, for they are things to be credited, being made by Officers of Trust.

Council.

The Council of that Party which doth begin to maintain the Issue, whether of Plaintiff or Defendant ought to conclude.

A

A Juror who is a Witness must be also sworn in open Court to give Evidence, if he be called for a Witness; for the Court and Council are to hear the Evidence as well as the Jury. Juror.

The Jury may carry from the Bar an Exemplification under the Great Seal of Depositions in Chancery, but if they are not exemplified, the Jury can only look upon them at Bar, but not have them with them out of Court. Exemplification.

If one produce a Lease made upon an Outlawry, to prove a Title, he must also produce the Outlawry it self; but if it be to prove other matter, he needs not shew the Outlawry. And so it is of an Extent, without shewing the Statute or Judgment on which the Extent is grounded. Lease upon an Outlawry.

By Rolls an Office found after the death of a Tenant in Capite of Lands in another County, may be given in Evidence to try the Title of those Lands, if there was a special Livery granted unto the Heir. Office.

If a Witness be Bail, upon motion the Court will give leave to alter the Bayl. Stiles 385. Bail.

Debt on 5 El. 9. Because the Wife did not appear, whereas he charged her and tendred to her her charges, and though not laid what damages, yet being for the 10 l. upon the Statute, not for his damages for her not appearing, and a Feme Covert being within the Statute, 'twas held good enough, 3 Cro. 130. Leon. 122. Note, she being the person who was to appear, the charges are to be tendred to her or her Husband. Wife. Charges.

Debt

Charges. Debt for 10 l. against a Witness, upon the Statute 5 Eliz. doth not lye, unless the Witness hath his charges, and he is not bound to come without his charges first paid: but if he accepts of 12 d. and a promise for the rest at the Tryal, he is bound and an Action lyeth against him, if he doth not come. Cro. 1 part, 522, 540. Goodwin against West.

Chaplain. A Copy of his Retainer by a Nobleman, entred in the Court of Faculties, denyed to be given in Evidence. Littleton Rep. 1. But one that had seen it under the Hand and *Quare impedit.* Seal of the Nobleman, was allowed a good Witness, because the Plaintiff was a stranger, &c.

In Evidence, he which affirms the matter in Issue, ought first to make the proof to the Jury. lb. 36.

Counsellor. A Counsellor may be examined as a Witness against his Clyent, so far as it is of his own knowledge, not what his Clyent reveals to him, but what he knows only by his Clyents information.

Counsellor. Mr. Aylet having been Counsel for the Defendant, desired to be excused to be sworn on the general Oath, as Witness for the Plaintiff, to give the whole truth in Evidence, which the Court, after some dispute granted, and that he should only reveal such things as he either knew before we was of Counsel, or that came to his knowledge since by other persons, and the particulars to which he was to be sworn were particularly proposed, viz. What he knew touching a Will in question, and the Court only put

Spark against Middleton. Keeble 1 part, 505.

the

the queſtion, whether he knew of his own knowledge, &c.

In Criminal Cauſes againſt the King, Witneſſes may be ſworn, unleſs the Crime be Capital. Criminal Cauſes.

Tenant at Will of part of the Lands was admitted to prove Livery of Seiſin, and the execution of a Feoffment under which he held, Bulſt. 1 part, 202. Tenant at will

If one be attainted of Felony and pardoned, he ſhall not afterwards be ſworn of a Jury, for Pœna mori poteſt, culpa perennis erit, and therefore is not fit to ſerve on the Inqueſt, nor yet to be an indifferent Witneſs, and two ſuch Perſons proving a Suggeſtion, were rejected, and the Prohibition diſallowed, Brown againſt Craſham, Bulſt. 2 part, 154. Attainted of Felony.

In Treſpaſs with a ſimul cum, if nothing be proved againſt them in the ſimul cum, they may be examined as a Witneſs, Stiles Rep. 401. *Simul cum.*

Neither he that pays or takes Collection can be a Witneſs in ſuch Caſes. Poors concerns.

Ceſtuy que Truſt is not to be admitted a Witneſs where the Title of the Land comes in queſtion. Witneſſes.

One who would have any Collateral Title to the Land, as if he hath a good Deed by the Anceſtor who would charge the Land in the Hands of the Heir, is not to be admitted an Evidence. Truſt.

But one who has an equitable Collateral Title upon the Land is admittable to be a Witneſs.

The

King. The Kings Message or Letter shall not be allowed for Evidence between Party and Party; otherwise where the Matter was secret, and that the King only had Personal Knowledge, as in Sir George Reynels Case, Co. 9 Rep.

Depositions. Regularly the Depositions in Chancery of a Witness shall not be given in Evidence if he be alive, although he be beyond Sea, as in Ireland, &c. otherwise if he be in France, or another Kingdom not subject to the Dominion of our King.

Pasc. 20 Car. 2. Colt vers. Colt. Perjury. Indictment of Perjury doth not disable a Witness, otherwise of a Conviction, whether it be by Common Law or Statute.

Sid. 269. Consent. Upon a Motion there was a Rule made by consent, That a Deed shall be allowed upon Evidence at the Assises without proving of it, which was allowed because of the consent.

Mich. 18 Car. 2. B. R. 66. Smith vers. Rawlins. Impropriation Vicar. Upon Evidence at Bar it was agreed that an old Impropriation shall be presumed to be well and lawfully made. A Vicar might anciently been have endowed without a Deed sealed, being only an Ordination of the Bishop, and Allotment of Maintenance.

Trustee. A Trustee cannot be a Witness concerning the Title of the same Land, the Interest in the Law being lodged in him.

Mic. 19 Car. 2. B. R. 67. Witness. By Twisden and Windham, if an Action be brought against two, and no Evidence is given against one, he may be a Witness himself in the Case.

Agreed

Agreed by the whole Court, that if in Evidence the Executor give in Evidence, the Probate under the Seal of the Ordinary, nothing can be given to the contrary that he is not Executor; for Causes Testamentary belong entirely and originally to the Ordinary; and if the Will be forg'd the Suit ought to be in the Spiritual Court to repeal the Probate, according to 4 H. 7. 12. So of Letters of Administration it cannot be alledged that there was a Will; but if there be a Suit it must be in the Spiritual Court to repeal it. Yet some Books seem to the contrary, as Fitz. Estoppel 9. Bro. Testam. 4. 22 H. 6. 52. 21 E. 4. 50. a. Com. 282. 9 Co. 31. a. Old Entries 325. 1 Brownl. 79. Also upon Evidence it may be proved that the Probate or Letters of Administration were forg'd.

Pasc. 2 Car. 2. B. R. 68. Nowel verſ. Willson.

Will.

Administration.

In Debt against the Heir upon an Obligation made by his Ancestor and J. S. jointly and severally, J. S. was sworn a Witness for the Plaintiff.

Joint Obligation.

In Trespass against A. simul cum B. & C. B. & C. are admittable to be Witnesses if the Plaintiff hath not arrested them, or at the least demanded Process of the Sheriff to do it.

Hill. 1651. Coram Roll. Trespass. Simul cum.

In Debt against the Heir who pleads Riens per descent, proof that the Father was seised, and that the Heir did enter after his Death, is well enough, for it shall be presumed Fee-simple till the contrary be shewn.

Riens per descent.

In Debt by an Administrator upon an Obligation, the Defendant pleads Non est

Administration.

factum, the Plaintiff in Evidence need not to shew the Letters of Administration, for this is admitted by the Defendants Plea of non est factum.

Where Plaintiff or Defendant is Administrator, if the Letters of Administration bear date after the Action brought, that is well enough.

Trin. 1650. Grand Jury. A Clerk attending upon a Grand Jury shall not be compelled to be a Witness to reveal that which was given them in Evidence.

Mich. 1650. Coram Roll ad Guild-hall, Littleton vers. Poins. Private Act. Just. of Peace. The Copy of a private Act of Parliament may be given in Evidence; and if upon Collateral Issue its to be proved that such an one was Justice of the Peace, or Baronet, &c. Common Reputation is sufficient proof without shewing the Commission or Letters Patents of the Creation.

Eod. Termin. Servant. In Action upon the Case for retaining of his Servant per quod servitium amisit, the Plaintiff ought to prove that the Defendant had conusans that he was his Servant.

Hand. Chief Justice said, If a Man be over Sea or Dead, the Party shall be admitted to prove his Hand by Witnesses, or comparing with other of his Writings, to which the Court agreed.

Perjury. Plaintiff recovers against the Defendant upon the sole Evidence of J. S. and has Judgment, and afterwards J. S. was convict of Perjury upon the same Evidence; notwithstanding the Court would not set aside the Judgment. But if it had been after Verdict that an Indictment of Perjury

jury was depending againſt J.S. the Court would have ſtopt entring the Judgment till the Perjury tried.

It was doubted by Twiſden, that if one upon Evidence forſwear himſelf, and afterward the principal Action is annulled by Writ of Error, if afterwards he is indictable for this. Mic. 22 Car. 2. B.R. Roy verſ. Serjant.

By Roll, If one convict of Felony be pardoned, or is burnt in the Hand, he may be a Witneſs again. Felony.

After Conviction and Clergy allowed, one is capable to be a Witneſs per Cur.

Radford brings an Action of Debt upon the Statute of 5 Eliz. cap. 9. for 10 l. againſt J. S. and declares that he was warned by Subpœna to appear ſuch a day at one of the Clock in the Afternoon to be a Witneſs, &c. And upon Nil debet pleaded, the Subpœna given in Evidence was generally to appear at this day, and not at ſuch an hour; and although a Subpœna to appear at ſuch a day be of that effect, that the party ought to attend the whole day, and ſo as it was objected, includes that he ought to appear at this hour, yet in reſpect of the variance it cannot be ſaid to be the Subpœna on which the Plaintiff did declare, and therefore he was non-ſuited; and in this caſe no regard was had to the Ticket left with the Defendant, which was according to the Declaration. 24 Car. 1. Radfords Caſe. Subpœna.

In an Action brought by a Woman for ſlandering of her, by which ſhe loſt her Marriage with J. S. the Marriage with J. S. Marriage. Starch verſ. Ely, 24 Car. Rot. 494.

is not traverſable, but ought to be proved in Evidence.

Tithes. Crawly verſ. Thorne, Mich. 22 Car. 2.

In Debt for Tithes, if the Plaintiff declares that he is Proprietor of a Farmer, its ſufficient, and may give his Title in Evidence.

Guardian.

Guardian in Socage ſhall be admitted to be a Witneſs for the Infant, for he is accountable.

Record. Lawrence verſ. Key.

A Copy of a Record is not true, unleſs it be tranſcribed in the ſame Language, and therefore a Tranſlation ſhall not be given in Evidence, as where the Record is in Latin and the Copy in Engliſh.

Copy-hold.

A Copy of Copy-hold Lands may be given in Evidence where the Rolls are loſt, or not loſt, Mich. 15 Car. 2. B. R. Snow verſ. Cutler.

Mic. 16 Car. 2. B. R. Depoſitions. Bankrupt. Coroner.

Note, That the Depoſitions taken before the Commiſſioners of Bankrupts ſhall not be uſed as Evidence at a Trial, although the Witneſſes be dead: But Depoſitions taken before the Coroner, with proof that the party that made them is dead, ſhall be good Evidence; as it was ruled in the Caſe of the King and Browning, Paſch. 18 Car. 2. B. R.

Copy of a Recovery.

A Copy of a Recovery after long debate ſuffered to be given in Evidence, the Recovery it ſelf being burnt. And Hale ſaid the Exemplification of a Record under the Mayor of Briſtols Hand was allowed for Evidence, Modern Rep. 117. Green and Prouds Caſe.

Exemplification.

On an old Recovery the Court allowed it, though no Tenant to the Præcipe could be proved, but it shall be intended, 2 Cro. 455. Mod. Rep. 117.

A Truſtée may be a Witneſs againſt his Truſt, by Hale Chief Juſtice; but Twiſden doubted thereof. Truſtee.

A Guardian in Socage ſhall be admitted to be a Witneſs for the Infant, for he is accountable. Guardian.

Actual priſal eſt bone Evidence de prove Converſion ſans demand, Siderf. 264. Trover.

Caſe in a feigned Iſſue out of the Chancery to try the Forgery of a Will of Sir ——— Cuts, whereby he gave to his Couſin Dorothy, now Pickerings Wife, ſuch Lands for 99 years, wherein it was ſaid, That if ſhe ſo long live was raſed out, and ſo made abſolute for ſo many years. And one Mr. Baker was called a Witneſs for the Plaintiff, who deſired the direction of the Court whether he ſhould be ſworn, becauſe he was Solicitor in the Caſe for the Defendant. The Court ſaid, That about the Matter before he was imployed he is to be ſworn; but we will not examine him about any Privacies in what he is imployed ſince that time; And Mr. Attorny General ſaid he demurred in Chancery for the ſame Cauſe, and was over-ruled to be examined. And it was held a Man cannot give in Evidence an Hearſay, though the Man be dead; but a Man may give in Evidence an Hearſay of an Act at the preſent time, thereby to fortifie and corroborate what the other ſays. Cuts verſ. Pickering, B.R. Paſc. 24 Car. 2. Solicitor. Hearſay.

Pasc. 27 Car. 2. in B. R. --- vers. Cotewell.

In Ejectione, upon Not Guilty, upon Evidence to the Jury at the Bar, the Case was such, That Cotewell had a Lease for years of the Prebend of Sutton Regis in the County of Bucks, made in the time of H. 8. and being expired, he now claimed under a Lease from a Nominal Prebendary thereof founded in the Cathedral of Lincoln: But the Plaintiff claimed by Letters Patents thereof from King James, made the 7th of King James to Brent and his Heirs, who granted the same to the Widow of Sir W. Rawleigh and her Heirs, whose Daughter and Heir Sir Jervis Elwaies married; and the Possession was according to this Grant; Whereupon the question was if they ought to shew how it came to the Crown. Hale Chief Justice said, That the Statute for confirmation of Patents, Jac. takes notice that Prebend did come to the King. And in Edw. 1st. time was a device, that all that claimed Terra Regis should shew how it came to the Crown, which often vanished away. And in late Times, in a Trial at this Bar, Mr. Latch did non-suit the Plaintiff upon the claim of Monastery Lands, although he proved the House had it, because did not make out how it came to the House; but since that time the Court have intended it well come to the House, the Possession having went accordingly with it: And he said he was of Council in a Trial at Bar for an Impropriation, where it was insisted that it was Presentative till Edw. 4th's Time, and could not be appropriated without the Kings Licence,

Monastery Lands.

Possession.

Licence, quod Curia conceſſit, and he could not produce the Licence, yet becauſe it was enjoyed ever ſince Edw. 4th's Time as appropriate, the Court did intend a Licence, and that the Patent was loſt before the Enrolment, and accordingly the Verdict went then. The Defendant offered to read a Copy of a Leaſe out of the Leiger Book of the Dean and Chapter of Linclon, but it was diſallowed by the Court, for the Book it ſelf is but a Copy, and a Copy of a Copy is no Evidence. And in this Caſe the Court did preſume the Grant to King James to be loſt, and thereupon Judgment was for the Plaintiff. Copy of a Leiger Book.

A Poor Houſe-keeper may not be a Witneſs for the Hundred in a Robbery, Modern Rep. 73. Robbery.

Entry and Suſpenſion may be given in Evidence upon Nil debet pleaded, Modern Rep. 35. per Twiſden, and Browns Caſe 118. Nil debet Rent.

Freſh Suit may be given in Evidence in an Action of Debt for an Eſcape on Nil debet pleaded, per Hale and Wild contra Twiſden. Hale ſaid he always allowed it, and ſo ſaid Wild Juſtice, Modern Rep. 116. Moſedals Caſe. Eſcape.

One Coparcener not to be Evidence for another in Ejectment, becauſe ſhe claims by the ſame Title, though not Party to the Suit. But the Daughter of her Siſter may be ſworn, for although ſhe ſhould be Heir, yet her Mother may give the Lands to whom ſhe Will, being Fee-ſimple. Paſc. 13 Car. 2. B. R. Truel verſ. Caſtel. Coparcener.

Ibid. Decree. A Decree produced in Paper is not to be given in Evidence without Bill and Answer, per Twisden. Otherwise if not in Paper.

Ibid. A printed Copy of an Act of Parliament is not to be given in Evidence, if not examined by the Rolls and sworn.

Acts of Parliament. A private Act that concern'd Rochester-Bridge, though printed by Rastal, was not allowed in Evidence, not being examined by the Record. Otherwise of General Statutes, there the printed Book is good Evidence. Lamberts Perambulation, Co. Rep. and F. N. B. are good Evidence, 3 Keeble 91.

King. Witnesses may be sworn against the King in Criminal Causes, not in Capital, Rex vers. Percival, Hill. 15 and 16 Car. 2. B. R.

Book. Crouch *and* Drury, Pasch. 13 Car. 2. B. R. A Mans Book of Accounts is no Evidence for the Owner of the Book, but for the adverse Party, for his Book cannot be of better Credit than his Oath, which would not serve in his own Case, Ergo.

Copy. Deed. A Copy of a Deed is good Evidence where the Defendant has the Deed and will not prove it, per Vernon Justice, Clay. Rep. 15. Modern Rep. 4. 266. 2 Keeble 483, 546. Moor 297.

Copy. Lease. Copy of a Counterpart of a Lease, the Lease being lost, given in Evidence and allowed, Mich. 15 Car. 2. Stroud vers. Dr. Holt, B. R.

Deed. Seals. Though the Seals be broken off a Deed, yet the Deed may be given in Evidence, Modern Rep. 11.

De-

Defendant claimed by Patent to Vanlore in 22 Jac. tot talia tanta &c. (as Dyer) the Duke of Somerset, or Abbey of D. had them; And though by way of Pleading a lawful Usage be sufficient, yet on Issue thereon, or in any Evidence it may appear that the Duke or the Abbey had a substantive of bona & catalla Felonum, by Hales Chief Justice and the whole Court: For most Grants of Abbey Lands as these are Relative, and no Substantive Grants appearing, the other Evidence was disallowed, especially for that the Duke of Somerset was attainted, and so his Privileges thereby extinct, unless regranted, 3 Keeble 456. in Sandford and Clerks Case, Moor 297. Patents. Tot talia tanta &c.

Lamberts Peramblation, Co. Rep. F. N. B. are good Evidence. Rastals Statutes are good Evidence of General Statutes, but not of private Acts. Perambulation Statutes.

Deed with Seals torn off admitted to declare use of a Recovery, Palmers Rep. 403. See Modern Rep. Tit. Evidence. Deed. Seals.

Legatee or Devisee of an Annuity may be an Evidence to prove the Will, if he hath received it, or released it; and this though after the Action commenced, Siderf. Rep. 315. Will.

The Cirograph of a Fine may be given in Evidence, but not given to the Jury; but a Recovery may be delivered in Evidence, 2 Siderfin 145, 146. Plow. Com. in Scholasticas Case 410. Fine. Recovery.

Recovery in value in Evidence may be given in Evidence, 2 Sid. 145.

Decree

Decree. Decrée in Chancery is not Evidence at Common Law, 2 Sid. 75.

Parishioners. Parishioners may be Witnesses to a Devise, by which a Parish claims Lands to the Relief of the Poor, 2 Sid. 109.

Bill. Bill in Equity is no Evidence against the Plaintiff. But

Equitable Interest. An Interest in Equity disables a Man to be a Witness, 2 Keeble 345.

Escape. Upon a Trial at Bar it was agreed that in Debt upon an Escape, and nil debet pleaded, Reprisal upon Fresh Suit may be given in Evidence by the Defendant in excuse of the Action.

Foreign Attachment. Custom of Foreign Attachment may be pleaded or given in Evidence, 3 Keeble 221.

Creditor. After four Months that a Dividend is made a Creditor is a good Witness, for no other Dividend shall be intended, 3 Keeble 348. Bents and Mico.

Mic. 22 Car. 1. Continuando. For making a Trespass Continuando there ought to be a Re-entry of the Plaintiff, and for the not proving thereof, the Plaintiff shall have Damages only for the first Entry.

Will. A Will under which a Title to Land is made to the Plaintiff must be shewn it self to the Court, and the Probate it self is not sufficient, 1 Keeble 117. Trial p. Pais 215. The same Case cited 2 Roll 678. between Bret and Bret, 10 Car. 1.

Pasch. 1651. Will. The Copy of a Will according to the Book of the Register in the Court Christian shall not be admitted to prove a Will of Lands, except the Possession has gone a long time accordingly.

2 Roll

2 Roll 678. adjudged, That Probate of a Will by Witneſſes for Lands is not Evidence at Common Law, although the Probate was good as to the Perſonal Eſtate deviſed, betwéen Bret and Bret, Hill. 10 Car. 1. Probate.

Upon Plene adminiſtravit pleaded, the Account given to the Ordinary ſhall not be given in Evidence, nor any reſpect to it, 2 Roll 678. Turvies Caſe, Paſch. 7 Jac. per Cur. Plene Adminiſtravit.

Recital of a Patent in another Patent is no Evidence of the recited Patent, 2 Roll 678. Trial per Pais 232, 235. Hardres 323. Recital.

If a Witneſs be convicted of Felony, and afterwards pardoned, whether he ſhall be thereby reſtored to be a good Witneſs. And Scrogs Chief Juſtice, and Raymond Juſtice were of Opinion that he could not, becauſe the Pardon doth take away the Puniſhment due to the Offence, but cannot reſtore the Perſon to his Reputation; and of that Opinion was Juſtice Nichols, Moor 872. in Cuddington and Wilkins Caſe; But Juſtice Jones and Juſtice Dolbin cont. And afterwards Raymond was of their Opinion: For in Roberts Reports of Cuddington and Wilkins Caſe its ſaid that the Pardon takes away not only pœnam but reatum. Another quære was, Whether a Man convicted and burnt in the Hand be ſtigmatized as to his Teſtimony: And Jones Juſtice held he is not, becauſe the burning in the Hand is no part of his Judgment; and is by 4 H. 7. cap. 13. only to notifie to the Judge that he hath had his Clergy before, Mrs. Celiers *Caſe*, Paſc. 32 Car. 2. B. R. Felons. Pardons.

before, 5 Co. 50. a. Biggins Case. But having examined the Case, do find no Judgment given therein, but compounded as its Reported both 3 Cro. 682. and by Moor 571. and Cro. says there were two Judges against two. And Moor says it was agreed the King could not pardon the burning in the Hand in an Appeal: and in truth it seems to be part of the Judgment; for the Entry is, Ideo consideratum est quod le Offender cauterizetur in manu sua leva. Rast. Entries, 1. b. 56. a. But upon the whole matter it appears by Heston's Case, cited in Foxley's Case, 5 Co. 110. That the burning in the Hand is (by virtue of 18 Eliz. Cap. 6. which saith the Prisoner shall be forthwith enlarged) in the nature of a Pardon.

Trin. 32 Car. 2. B. R. en Count de *Castlemains* Case, for intending to kill the King.

Dangerfield was produced as a Witness, who had been found Guilty of several Indictments of Felony for which he had his Clergy, and was burnt in the Hand. And upon other Indictments he had been on the Pillory for cheating, but had obtained his Pardon under the Great Seal for all his said Offences. A Question did arise, whether he might be a Witness: and thereupon the Prisoner did desire to have Counsel assign'd him, and it was granted. And Darnel one of his Counsel urged, that Dangerfield ought not to be a Witness, for he was blemished, and the Pardon had not restored him, and cited 2 Brownl. 47. where its said, that the King pardoned a Man Attaint for giving a false Verdict, that he shall not be at another time Impannell'd upon a Jury; for though the punishment were pardoned,

doned, yet the guilt remains. 2 Bulſtr. 154. Brown verſus Craſhaw. In a Prohibition, the ſuggeſtion was proved only by two perſons attainted of Felony. And Coke Chief Juſtice cited Hill. 11 H. 4. 41. b. Pl. 7. That if a Man be attainted of Felony and pardoned, he ſhall not after be ſworn upon a Jury, becauſe he is not probus & legalis homo. But the Court willing to be throughly ſatisfied, ſent Juſtice Raymond to the Court of Common-Pleas to know their Opinion in this point; and the Judges there reſolved, That the burning in the Hand was quaſi a Statute pardon as to the Felony, and as to that he was a good Witneſs, and the Kings Pardon made him a good Witneſs as to the other Offences; but they ſaid, had he not been burnt in the Hand, the Pardon would not have reſtored him to his credit again, becauſe in his Teſtimony the People are concerned, and conſequently the Pardon will not deprive them of their Intereſt. And thereupon the Judges here allowed him to be a good Witneſs; and with the Opinion of the Judges of the Common-Pleas, as to the burning of the Hand agree the Books of 5 Co. 110. a. Heſton's Caſe. Hob. 292. and Hob. in Cuddington verſus Wilks. But Moor 872. ſays Juſtice Nichols was of Opinion, That if the Plaintiff had been convicted, the Judgment would have been otherwiſe. But Caſtlemain was found not Guilty on the whole matter. Clergy. Pardon.

Upon the Statute of Huy and Cry, at a Tryal ſome Houſekeepers appeared as Witneſſes, that lived within the Hundred, who being Robbery.

being examined, said they were poor and paid no Taxes or Parish Duties. And the Query was, whether they were good Witnesses? Twisden went down from the Bench to the Judges of the Common-Pleas for their Opinions, who said, Judge Wild was confident that they ought not to be sworn, but Judge Tyrrel doubted, but after was of the same Opinion, because when the Mony is recovered against the Hundred to be levied they might be worth something. Mod. Rep. 74.

Parishioner. It was held in the Case of Meredith against the Hundred of Warlington, Pasch. 1657. That a Parishioner is not a competent Witness to prove the Bounds of a Parish where he is an Inhabitant, although he pay neither Scot nor Lot, but receives Alms of the Parish, because he is subject to the Watch and Ward, and so is concerned something, though not so much as others: Sty. N. P. R. 571, 572.

Pedigree. Upon Evidence to a Jury to prove J. S. to be Heir to W. S. the Court would not accept the Pedigree drawn by an Herald at Arms for Evidence, nor would suffer the Jury to have it with them, but 'tis only information for direction. Pasch. 8 Jac. B.R. Sir Edward Plumpton and Robinson. 2 Roll. 687.

Felons. If one be attainted of Felony and pardoned, he cannot be either Juror or Witness.

Pardon. Contra per Coke. 2 Bulstr. 154. Brown and Crashaw. Nor can a Recusant Convict be a Witness, for he is a person Excommunicate. Co.

Excommunicate.

At

At a Commission of Review, in the Case between Bray and Whitehay, concerning the Will of Mr. George Bray of Lincolns-Inn, who gave thereby all his Estate to a Woman he kept, and made her his sole Executrix, and waived his Brother: It was said by Justice Ellis, That it was resolved by the whole Court in the Case of Dutton upon a Tryal at Bar, concerning a Will forged by Mr. Colt, that Depositions taken in Chancery, in perpetuam rei memoriam, upon a Bill for that purpose Exhibited, cannot be given in Evidence at a Tryal at Law, unless there be an Answer put in and produced; and so he said he hath known it several times resolved, both in B. R. and C. B. See Hardres Rep. Wat's Case.

Depositions *in perpetuam rei memoriam.*

In an Information against P. That whereas he had cheated one Lee in a Match, to the intent that the Lands of this Lee should be charged before Marriage, he procured the Feme to acknowledge a Judgment to him, where in truth no Debt was due by the Feme; in this Case the Feme was admitted a Witness for the King, though the profit of the Husband was collaterally concerned, for by this Evidence if it be found against P. the Judgment shall be set aside.

Mich 21 *Car.* 2. B. R. The King against *Paris.* Feme covert.

A Trustee may be a Witness if he release his Trust, so if he be in possession of the Lands in question as Servant. Sidenfin 315.

Trustee.

In an Information of Forgery for publishing a forged Deed, importing the revocation of a Will, to the prejudice of the Executors and Legatees; 'twas resolved by all the

Trustee. Legatee.

the Barons of the Exchequer, upon conference with the Judges of the Kings-Bench, First, That a Truſtée who has conveyed over his Eſtate in Truſt, or has aſſented thereunto, cannot be a Witneſs for the King in this Caſe, nor can a Legatee, nor any other perſon that is a loſer by the Deed, or may receive any advantage by the Verdicts being found for the King. Hardres Rep. 331. Not's Caſe.

But in Deceit for forging a Will, a Legatee was allowed and ſworn as a Witneſs in the Tryal for the Forgery, for this makes nothing to the probate of the Will, or Recovery of the Legacy in the Spiritual Court, nor do they take notice of it.

Indeb. aſſump. Account. Matters that lye in Account are not to be given in Evidence on an Indebitatus Aſſumpſit, per North Chief Juſtice, Modern Rep. 270.

Payment. In an Action of Aſſumpſit, grounded upon a promiſe in Law, payment may be given in Evidence, but not where the Action is grounded upon an expreſs promiſe. Modern Rep. 210.

Record. In Trover for Goods, the proof depended on a Fieri facias, and venditioni exponas, which could not be found on Record, and admitted to be proved in Evidence. Hardres Rep. 323, 324.

Ejectment. A Verdict for a Leſſee, is good Evidence for the Reverſioner in an Ejectment. Hardres Rep. 472.

Secus in caſe of Depoſitions for the Leſſee, the Reverſioner without being Party to the Suit

Suit can have no advantage, 472, 473. ibid.

The Act of general Pardon, cannot be given in Evidence on non debet modo & forma, but ought to be pleaded, for that it is not the general Issue within the intent of the Act. Hardres Rep. 421. *Non debet.* General Pardon.

In an Action on the Case, when the Request is laid at one time in the Declaration, a request at another time may be given in Evidence. Syd. Rep. 268. Request. Another day.

It was resolved in one Long's Case, that upon an Information upon the Statute of Usury, the person who borrows the Mony may be a Witness after he hath paid the Mony, but not before. Mich. 22 Car. 2. B. R. per Twisden Justice. Usury. *Per Twisden* Justice, 22 *Car.* 2. B. R.

If an ancient Deed of Feoffment be shewn but no Livery upon it, if possession have gone along with the Deed, this is good Evidence to a Jury to find Livery. Roll. 1 Rep. 132. Feoffment. Livery.

If a Condition be to pay Mony at a certain day and place to avoid a Feoffment, acceptance before the day although he make an Acquittance, doth not maintain the Issue joyned on payment at the day and place. Moor 47. Payment at the day.

If A. Indite B. on the Statute 5 Eliz. cap. 9. of Perjury, as a party grieved, the prosecutor cannot be a Witness against B. Roll 685. 2 part. Perjury. Prosecutor.

Evidence may be given to mitigate Damages, in all cases where Damages are to be recovered, as in Wast, that the Premisses were ruinous at the time, &c. or burnt

by Enemies, &c. See Olive and Gwin's Case in Siderfin 2 part, 145. in the Exchequer, good matter concerning Evidence, where 'twas adjudged, that a Record had in Brecknock in Wales, under the Seal of Brecknock, might be given in Evidence. See Hardres Rep. 118.

Perjury. Judgment stayed, because the Verdict was laid upon the testimony of one Witness, and he since convict of Perjury in the same thing. Pas. 17 Car. 2. B. R.

Two Witnesses. There ought to be two, where the Tryal is by Witnesses.

CAP. XII.

The Juries Oath; why called Recognitors in an Assise, and Jurors in a Jury. Of the Tryal *per medietatem linguæ*; when to be prayed and when grantable. Of a Tryal betwixt two Aliens, by all English. Of the *Venire facias*, *per medietatem linguæ*, and of Challenges to such Juries.

Assise, Enquest and Proof, are taken for the word *Jury*. *Vide* 28 E. 3. 13.

THE Jury having heard their Evidence, let them now consider of their Verdict: But first they must remember their Oath, which in effect is, To find according to their Evidence, and therefore they should have had

had it before the Evidence, but that the form and order of the Venire facias (which I have tyed my self to follow) leads me to it after their Evidence, in these Words, Ad faciend. quandam Juratam; I have already shewed the derivation of this Word Jurata, and what is the legal acceptation of it; only observe with our Great Master Littleton, That the Word Assise is sometimes taken for a Jury, so as the Learned Commentator doth well Paraphrase, That the Word Assise is Nomen Æquivocum Æquivocans, because sometime it signifieth a Jury, sometime the Writ of Assise, and sometime an Ordinance or Statute; but Jurata, is Nomen Æquivocum Æquivocatum, because we always understand that Word (according to the aforesaid difinition) to be a Jury of Twelve Men, so called, by reason of the Oath they take, Truly to try the Suit of Nisi prius, between Party and Party, according to their Evidence.

See Chap. 1.

1 Inst. 154.

Assiza for *Jurata.*

The Juries Oath.

And as in an Assise, the Jurors are called Recognitors, from these words in the Writ of Assise, facere Recognitionem; so upon a Nisi prius, they are called Juratores, from these words in the Venire facias, Ad faciend. quandam Juratam.

Why called Recognitors in an Assise, and Jurors in a Jury.

In ancient time, the Jury, as well in Common Pleas, as in Pleas of the Crown, were twelve Knights, as appears by Glanvil, Lib. 2. Cap. 14. and Bracton, f. 116.

12 Knights.

The next words of the Venire facias, are Inter partes prædictas. In the fourth Chapter, I have instanced, That in some Cases, a Jury shall be awarded betwixt the party,

and a ſtranger to the Writ and Iſſue; I will now ſhew what the Jury ſhall be, when one of the parties is an Alien, the other a Denizen; and when both parties to the Iſſue are Aliens.

Jury per medietatem linguæ.

This Tryal is called in Latin, Triatio bilinguis, or per medietatem linguæ. And this Tryal by the Common Law was wont to be obtained of the King, by his Grant made to any Company of Strangers, as to the Company of Lumbards or Almaignes, or to any other Company, that when any of them was impleaded, the moyety of the Inqueſt ſhould be of their own Tongue. Stanf. Plea, Cor. Lib. 3. Cap. 7.

Its Antiquity.

And this Tryal in ſome Caſes, per medietatem linguæ, was before the Conqueſt, as appears by Lamb. f. 91, 3. Viri duodeni Jure conſulti, Angliæ ſex, Walliæ totidem, Anglis & Wallis jus dicanto. And of ancient time, it was called Duodecimvirale Judicium. 1 Inſt. 155.

But afterwards this Law became univerſal: Firſt by the Statute of 27 Ed. 3. Cap. 8. It was Enacted, That in Pleas before the Mayor of the Staple, if both Parties were Strangers, the Tryal ſhould be by Strangers. But if one party was a Stranger and the other a Denizen, then the Tryal ſhould be per medietatem linguæ. But this Statute extended but to a narrow compaſs, to wit, only where both parties were Merchants or Miniſters of the Staple, and in Pleas before the Mayor of the Staple: But afterwards, in the twenty eighth year of

of the ſame Kings Reign, Cap. 13. It was Enacted,

That in all manner of Enqueſts and Proofs, which be to be taken or made amongſt Aliens, and Denizens, be they Merchants or other, as well before the Mayor of the Staple, as before any other Juſtices or Miniſters, although the King be Party. The one half of the Enqueſt or Proof ſhall be Denizens, and the other half Aliens, if ſo many Aliens and Foreigners be in the Town or Place, where ſuch Enqueſt or Proof is to be taken, that be not Parties, nor with the Parties in Contracts, Pleas, or other Quarrels, whereof ſuch Enqueſt or Proof ought to be taken: (212) And if there be not ſo many Aliens, then ſhall there be put in ſuch Enqueſts or Proofs, as many Aliens, as ſhall be found in the ſame Towns or Places, which be not thereto Parties, nor with the Parties, as aforeſaid is ſaid, and the Remnant of Denizens which be good Men, and not ſuſpicious to the one Party, nor to the other.

So that this is the Statute which makes the Law univerſal, concerning the medietatem linguæ; for though the King be party, yet the Alien may have this Tryal. And it matters not, whether the moyety of Aliens be of the ſame Country as the Alien party to the Action, is: for he may be a Portugal and they Spaniards, &c. becauſe the Statute ſpeaks generally of Aliens. See Dyer 144. King.

Venire facias, per medietatem linguæ.

And the form of the Venire facias in this Case is De vicinet. &c. Quorum una medietas sit de Indigenis, & altera medietas sit de alienigenis natis, &c. And the Sheriff ought to return twelve Aliens and twelve Denizens one by the other, with addition which of them are Aliens, and so they are to be sworn. But if this Order be not observed, it is holpen as a mis-return, by the Statute of 18 Eliz Cro. 3 part, 818, 841. So that Brook says, it is not proper to call it a Tryal, per medietatem linguæ, because any Aliens of any Tongue may serve. But under his favour I think it proper enough.

For People are distinguished by their Language, and Medietas Linguæ, is as much as to say, half English and half of another Tongue or Country whatsoever. Though it be not material of what sufficiency the (213) Jurors are, yet the form of the Venire facias, shall not be altered, but the Clause of Quorum quilibet habeat, 4 l. &c. shall be in, Cro. 3 part, 481.

(G. a. 2)

But suppose that both parties be Aliens, of whom shall the Inquest be then? It is resolved, that the Inquest shall be all English; for though the English may be supposed to favour themselves more than Strangers, yet when both parties are Aliens, it will be presumed they favour both alike, and so indifferent. 21 H. 6. 4. But if the Plea be before the Mayor of the Staple, and both parties Alien Merchants of the Staple, it shall be tryed by all Aliens. Stamford's Pleas del Corone, 159. A Scotchman is a Subject

and

and shall not have this Tryal. Egyptians are also excluded, when tryed for Felony made by the Statute against them, 1 Phil. and Mar. Cap. 4. 5 Eliz. Cap. 20.

All English.

Where an Alien is party, yet if the Tryal be by all English, it is not erroneous, because it is at his peril, if he will slip his time, and not make use of the advantage which the Law giveth him when he should. Dyer 28.

When the Alien should pray a *Venire facias per medietatem.*

The Alien ought to pray a Venire facias, per medietatem linguæ, at the time of the awarding the Venire facias: But if he doth it at any time before a general Venire facias be returned and filed, the Court may grant him a Venire facias de novo. Dyer 144. 21 H. 7. 32. though it hath been questioned.

Tales.

But if he hath a general Venire facias, he cannot pray a Decem Tales, &c. per medietatem linguæ, upon this; because the Tales ought to pursue the Venire facias. 3 E. 4. 11, 12. And so if the Venire facias be per medietatem linguæ, the Tales ought to be per medietatem linguæ; as if six Denizens and five Aliens appear of the principal Jury, the Plaintiff may have a Tales, per medietatem linguæ, Li. 10. 104. But if in this case the Tales be general, de circumstantibus, it hath been held good enough; for there being no exception taken by the Defendant, upon the awarding thereof, it shall be intended well awarded. Cro. 3 part, 818, 841.

Where the Tryal of an Aliens cauſe ſhall be by Engliſh.

If the Plaintiff or Defendant be Executor or Adminiſtrator, &c. though he be an Alien, yet the Tryal ſhall be by Engliſh, becauſe he ſueth in auter droit; but if it be averred that the Teſtator or Inteſtate, was an Alien, then it ſhall be per medietatem linguæ, Cro. 3 part, 275.

Part Engliſh and part Aliens.

Mich. 40 and 41 Eliz. The Queens Attorney exhibited an Information againſt Barre, and divers other Merchants, ſome whereof were Engliſh, and ſome Aliens: After Iſſue, the Aliens prayed a Tryal per medietat. Linguæ. But all the Juſtices of England reſolved, That the Tryal ſhould be by all Engliſh, and likened it to the Caſe of Priviledge, where one of the Defendants demands Priviledge, and the Court, as to his Companion cannot hold Plea, there he ſhall be ouſted of his Priviledge, ſic hic. More 557.

Challenge.

By the Statute of 8 H. 6. Cap. 29. Inſufficiency or want of Freehold is no cauſe of Challenge to Aliens, who are impanneled with the Engliſh, (notwithſtanding Stamford's Opinion, Pl. Coron. 160.) for this Statute ſaith, That the Statute 2 H. 5. 3. ſhall extend only to Enqueſts betwixt Denizen and Denizen.

When the Alien ſhould pray a *Venire facias per medietatem.*

If the Defendant do not inform the Court that he is an Alien, upon awarding of the Venire facias, and ſo pray a Venire facias per medietatem linguæ; he cannot challenge the Array for this cauſe at the Tryal, if the Jury be all Denizens (notwithſtanding Stamford's Opinion to the contrary, and the Books cited by him, fol. 159. Pl. Cor.)

For

For the Alien at his peril should pray a Venire facias, per medietatem linguæ. Dyer 357. Vide Rolls tit. Tryal 643.

If the Plaintiff be an Alien, he must suggest it before the awarding of the Venire facias; but if the Defendant be an Alien, the Plaintiff is allowed to surmise that, before or after the Venire facias, because the Defendants quality may not be known to him before. 27 H. 7. 32.

If the Defendant be an Alien, on notice given by his Attorny, to the Plaintiff or his Attorny, the Plaintiff ought to enter it on the Roll, to have a Tryal de medietate at his peril; but the Court refused to award it for the Defendant, on his Affidavit that he is an Alien, Keeble 1 part, 547. pl. 49. cit. 15 Car. 2 B. R. Vangangel v. Browning.

CAP.

CAP. XIII.

The Learning of General Verdicts, Special Verdicts, Privy Verdicts, and Verdicts in open Court; and where the Inqueſt ſhall be taken by default. Inqueſts of Office, &c. Arreſt of Judgment, Variance betwixt the Nar. and the Verdict, &c.

Verdict. VErdit or Verdict; In Latin, Vere dictum, quaſi dictum veritatis, as Judicium, eſt quaſi Juris dictum; Is the Anſwer and Reſolution of thoſe twelve Men, concerning the matter of Fact referred to them by the Court, upon the Iſſue of the Parties. And this is the foundation upon which the Judgment of the Court is built, for ex facto jus oritur; the Law ariſeth from the Fact; wherefore it is no wonder, that the Law hath ever been ſo curious and cautelous, as not to believe the matter of Fact, until it is ſworn by twelve ſufficient Men of the Neighbourhood where the Fact was done, whom the Law ſuppoſeth to have moſt cognizance of the truth or falſehood thereof, which being ſworn (for the words are, Juratores predict. dicunt ſuper ſacrum. ſuum, &c.) is the Verdict whereof we now treat: And ſuch credit doth the Law give to Verdicts, that no proof will be admitted

The credit of Verdicts.

ted to impeach the verity thereof, so long as the Verdict stands not reversed by Attaint. And therefore upon an Attaint, no Supersedeas is grantable by Law. Plo. Com. 496.

And it is worth our Observation, that the Law seems to take more care of the Fact, than of her self; for the major part of the Judges give the Judgment of the Law, though the other Judges dissent. But every one of the twelve Jurors must agree together of the Fact, before there can be a Verdict, which must be delivered by the first Man of the Jury. 29 Assises. Pl. 27.

And this Verdict is of two kinds, viz. one general, and the other special, or at large. General or special.

The general Verdict is positively, either in the Affirmative or Negative, as in Trespass, upon Not Guilty pleaded; the Jury find Guilty or Not Guilty; and so in an Assise of Novel disseisin, brought by A. against B. the Plaintiff makes his plaint, Quod B. disseisivit eum de 20 acris terræ, cum pertinentiis: The Tenant pleads, Quod ipse nullam injuriam seu disseisinam prefato. A. inde fecit, &c. The Recognitors of the Assise do find, Quod predict. B. injuste & sine judicio disseisivit prædict. A. de prædict. 20 acris terræ cum pertinentiis, &c. This is a general Verdict. 1 Inst. 228. General Verdict.

A special Verdict, or Verdict at large is so called, because it findeth the special matter at large, and leaveth the Judgment of the Law thereupon, to the Court; of which kind of Verdict it is said, Omnis Conclusio boni Special Verdict. 1 Instit. 226.

boni & veri judicii ſequitur ex bonis & veris premiſſis, & dictis Juratorum. And as a Special Verdict may be found in Common-Pleas, ſo may it alſo be found in Pleas of the Crown, or Criminal Cauſes that concern life or member.

The Court cannot refuſe it.

And it is to be obſerved, that the Court cannot refuſe a Special Verdict, if it be pertinent to the matter in Iſſue. 1 Inſt. 228.

A ſpecial Verdict may be found upon any Iſſue, as upon an *abſq; hoc, &c.*

It hath been queſtioned, whether the Jury could find a Special Verdict, upon a ſpecial point in Iſſue, or no, as they might upon the general Iſſue. But this queſtion hath been fully reſolved in many of our Books; firſt in Plo. Com. 92. It is reſolved, That the Jury may give a ſpecial Verdict, and find the matter at large, en cheſcun iſſue en le monde, ſo that the matter found at large, tend only to the Iſſue joyned, and contain the certainty and verity thereof. Lib. 9. 12.

And in 2 Inſt. 425. upon Collection of many Authors, it is ſaid, That it hath been reſolved, that in all Actions, real, perſonal and mixt, and upon all Iſſues joyned, general or ſpecial, the Jury might find the ſpecial matter of fact, pertinent, and tending only to the Iſſue joyned, and thereupon pray the diſcretion of the Court for the Law. And this the Jurors might do at Common Law, not only in Cales between party and party, but alſo in Pleas of the Crown, at the Kings Suit, which is a proof of the Common Law. And the Statute of Weſtminſter, the 2. Cap. 30. is but an affirmative of the Common Law.

And

And as this special Verdict is the safest for the Jury, 1 Inst. 228. so in many Cases it is most advantagious to the party, and helps him where his own pleading cannot. As for Example, saith Littleton, Sect. 366, 367, 368. Albeit a man cannot in any Action plead a condition, which toucheth and concerns a Freehold, without shewing writing of this; yet a man may be aided upon such a condition, by the Verdict of twelve Men, taken at large in an Assise of Novel disseisin, or in any other Action, where the Justices will take the Verdict of twelve Jurors at large: As put the Case, a Man seised of certain Land in Fée, letteth the same Land to another, for term of life, without Deed, upon condition to render to the Lessor a certain Rent, and for default of payment, a Reentry, &c. By force whereof the Lessée is seised as of Freehold; and after, the Rent is behind, by which the Lessor entreth into the Land, and after the Lessée arraign an Assise of novel disseisin of the Land against the Lessor, who pleads that he did no wrong nor Disseisin. And upon this, an Assise is taken. In this Case, the Recognitors of the Assise may say, and render to the Justices their Verdict at large, upon the whole matter; as to say that the Defendant was seised of the Land in his Demesn as of Fée, and so seised, let the same Land to the Plaintiff for term of his Life, rendring to the Lessor such a yearly Rent, payable at such a Feast, &c. Upon such Condition, that if the Rent were behind at any such Feast, at which it ought to be paid, then it should be

A Free-hold upon Condition, without Deed, may be found by Verdict, though it cannot be pleaded.

be lawful for the Lessor to enter, &c. By force of which Lease the Plaintiff was seised in his Demesn as of Frehold, and that afterwards, the Rent was behind at such a Feast, &c. By which the Lessor entred into the Land, upon the possession of the Lessee. And pray the discretion of the Justices, if this be a Disseisin done to the Plaintiff or not. Then for that it appeareth to the Justices, that this was no Disseisin to the Plaintiff, insomuch as the entry of the Lessor was congeable on him, the Justices ought to give Judgment, that the Plaintiff shall not take any thing by his Writ of Assise, and so in such case the Lessor shall be aided, and yet no writing was ever made of the Condition: For as well as the Jurors may have conusance of the Lease, they also may as well have conusance of the condition, which was declared and rehearsed upon the Lease.

So In the same manner it is of a Feoffment in Fee, or a Gift in Tail, upon Condition, although no Writing was ever made of it. And as it is said of a Verdict at large, in an Assise, &c. In the same manner it is of a Writ of Entry, founded upon a Disseisin, and in all other Actions where the Justices will take the Verdict at large, there where such Verdict at large is made, the manner of the whole Entry is put in Issue.

So But in Assise of Rent it cannot be found to be upon Condition, unless they also find the Deed of the Condition.

So

So of a Confirmation in Fee to Leſſée for years.

Per Hale Chief Juſtice, Guild-Hall, Hill. 1671. A ſpecial Verdict may be found as to Damages in an Action of the Caſe; as the Caſe was there, Viz. Pro Quer', and if ſo, &c. then ſuch Damages; if ſo, &c. then Damages ſuch; and he ſaid, he had known it ſo done in Debt, and the Damages three ways.

Alſo in ſuch Caſe, where the Enqueſt may give their Verdict at large, if they will take upon them the knowledge of the Law upon the matter, they may give their Verdict generally, as is put in their charge, as in the Caſe aforeſaid, they may well ſay that the Leſſor did not diſſeiſe the Leſſée, if they will, &c.

General Verdict.

Note the Court cannot refuſe a general Verdict, if the Jury will find it, as was held before Juſtice *Windham*, Lent Aſſiſes, 1681. in *Verdons* Caſe at *Cambridge*.

The Jury may likewiſe find Eſtoppel, which cannot be pleaded as in the ſecond Report, f. 4. it well appears, where one Goddard, Adminiſtrator of James Newton, brought an Action of Debt againſt John Denton, upon an Obligation made to the Inteſtate, bearing date the 4th day of April, Anno 24 Eliz. The Defendant pleaded, that the Inteſtate dyed before the date of the Obligation, and ſo concluded that the ſaid Eſcript was not his Déed, upon which they were at Iſſue.

And the Jury found that the Defendant delivered it as his Déed, 30th July, Anno 23 Eliz. and found the Tenor of the Déed in hæc

hæc verba, Noverint Universi, &c. Dat. 4. Aprilis, Anno 24 Eliz. And that the Defendant was alive 30 July, Anno 23 Eliz. And that he dyed before the said date of the Obligation, and prayed consideration of the Court, if this was the Defendants Deed: And it was adjudged by Anderson Chief Justice, Windham, Periam and Walmesley, That this was his Deed, and the reason of the Judgment was, that although the Obligee in pleading cannot alledge the delivery before the date, as it is adjudged in 12 H 6. 1. Which Case was affirmed to be good Law, because he is estopped to take an avermeent against any thing expressed in the Deed; yet the Jurors who are sworn ad veritatem dicend. shall not be estopped. For an Estoppel is to be concluded to speak the truth, and therefore Jurors cannot be estopped, because they are sworn to speak the truth. 251

But if the Estoppel or Admittance, be within the same Record in which the Issue is joyned, upon which the Jurors give their Verdict, there they cannot find any thing against this, which the parties have affirmed, and admitted of Record, although it be not true; for the Court may give Judgment upon a thing confessed by the parties, and the Jurors are not to be charged with any such thing, but only with things in which the parties vary, Ib. Lib. 5. 30. 2 Rep. 4.

So Estoppels which bind the Interest of the Land, as the taking of a Lease of a Mans own Land, by Deed indented, and the like, being specially found by the Jury, the Court

Note, That a Deed may be pleaded to be delivered after the date, but not before, because it shall not be intended written before the date, which may be after the date. 12 H. 6. 1.

As in Waste supposed in *A.* to plead that *A* is a Hamlet in *B.* and not a Town of it self, admitteth the Waste, *&c.* 9 H.6. 66. and the Jury cannot find no Waste, for that would be against the Record. Estoppel. Cro. 1 part 110. Lib. 4. 53.

Court ought to judge, according to the special matter; for albeit Estoppels regularly must be pleaded and relyed upon, by apt conclusion, and the Jury is sworn ad veritatem dicend. yet when they find veritatem facti, they persue well their Oath, and the Court ought to judge according to Law. So may the Jury find a Warranty being given in Evidence, though it be not pleaded, because it bindeth the right, unless it be in a Writ of Right, when the Mise is joyned upon the meer right. 1 Inst. 227.

Warranty not pleaded.

Verdicts ought to be such, that the Court may go clearly to Judgment thereon, and therefore Verdicts finding matter incertainly, or ambiguously, are insufficient and void, and no Judgment shall be given thereupon. As if an Executor plead Plene Administravit, and Issue is joyned thereon, and the Jury find that the Defendant hath Goods within his Hands to be administred, but find not to what value, this is an uncertainty, and therefore an insufficient Verdict. Lib. 9. 74. 1 Inst. 227.

Uncertain Verdicts.

In all special Verdicts, the Judges will not adjudge of any matter of Fact, but this which the Jury declare to be true of their own finding. And therefore the Judges will not adjudge upon an Inquisition, or aliquid tale found at large in a special Verdict, for their finding of this is not an affirmation, that all which is in this is true. Siderfin 2 part, 86.

Special Verdicts.

It is the Office of the Jurors, to shew the verity of the Fact, and leave the Judgment of the Law to the Court. And therefore

The Office of the Jury.

upon an Indictment of Murder, Quod felonice percussit, &c. If the Jury find percussit tantum, yet the Verdict is good, for the Judges of the Court are to resolve upon the special matter, whether it was felonice, and so Murder, or not, Lib. 9. 69. And if the Court adjudge it Murder, then the Jurors in the conclusion of their Verdict, find the Felon Guilty of the Murder contained in the Indictment.

Verdict finding part of the Issue.

A Verdict that finds part of the Issue, and finding nothing for the rest, is insufficient for the whole, because they have not tryed the whole Issue wherewith they are charged: As if an Information of intrusion be brought against one, for intruding into a Messuage and an hundred Acres of Land: upon the general Issue, the Jury find against the Defendant for the Land, but say nothing for the House, this is insufficient for the whole.

More 406.

Finding more than the Issue.

But if the Jury give a Verdict of the whole Issue, and of more, &c. that which is more is surplusage, and shall not stay Judgment: For Utile per inutile non vitiatur. Leon. 1 part, 66. Cro 1 part, 130. But necessary incidents required by Law, the Jury may find. Siderfin 232.

Where fatal. Siderfin 96. Keeble 1 part, 289.

If the Issue be upon a discent, and the Jury find the same, and a continual claim, that as to the continual claim is surplusage, 7 H. 6. 8, 9, 20.

In some Cases the Verdict may be found for the Plaintiff, and yet he shall be barred.

As

As 40 Ass. 6. in a Mortdancester, all the points of the Writ found for the Plaintiff, and yet he was barred for this reason, for although he was Heir to his Father, yet because the elder Brother by the half blood did enter, he was barred. Barred.

Yet in many Cases, nay almost in all, the Jury ought to find more than is put in Issue, otherwise their Verdict is not good; and therefore they are to assess Damages and Costs, because it is parcel of their charge, as a consequent upon the Issue, though it be not part of the Issue in terminis, Lib. 10. 119. Where the Verdict ought to be of more than is in the Issue.

A Verdict must be sufficient in matter and form, be the same special or general, and therefore they must lay Damages and Costs where the same ought to be found.

An Action of the Case on Deceit was brought, for that he sold unto the Plaintiff two Oxen, and warranted them to be sound; on not Guilty, the Jury found him Guilty as to one, and not Guilty to the other, and good; for that the Action was founded not on the Contract, but the Deceit. 3 Cro. 884. Gravenor and Mete.

In Debt the Plaintiff declares that he had Judgment against Baron and Feme for a Debt of the Wives, dum sola, &c. that they were in Execution and suffered to Escape, the Jury found the Husband only in Execution and escaped, and Judgment for the Plaintiff. Roberts versus Herbert, Hill. 12 Car. 2. C. B.

(K. 9. 10)

Damages by the first Inquest.

So in Trespass against two, one comes and pleads Not Guilty, and is found guilty. In this Case, the first Inquest shall assess Damages for the whole Trespass, by both Defendants; and afterwards the other comes and pleads Not Guilty, and is found guilty: The finding of Damages by the first Inquest, to which he was not party, shall bind him; and therefore if the Damages are outragious, and excessive, the Defendant in the last Enquest shall have an Attaint. Lib. 10. 119.

Attaint.

(H. 9. 2)

So in Trespass, Quare clausum fregit, if Issue be joyned upon a Feoffment, and the Jury give outragious Damages, an Attaint lies; for the inquiry of Damages is consequent and dependent upon the Issue, and parcel of their charge. Ibid.

Damages by the first Inquest.

In the 11th Report, fo. 5. It was resolved, That in Trespass against two, where one comes and appears, &c. against whom the Plaintiff declares with a simul cum, &c. who pleads and is found Guilty, and Damages assessed by the Enquest, and afterwards the other comes and pleads, and is found Guilty; The Defendant which pleaded last shall be charged with the Damages taxed by the first Inquest; for the Trespass which the Plaintiff had made joynt by his Writ and Count, and done at one time, cannot be severed by the Jurors, if they find the Trespass to be done by all, at one and the same time as the Plaintiff declared.

So

So in the Treſpaſs againſt divers Defendants, if they plead Not Guilty, or ſeveral Pleas, and the Jury find for the Plaintiff in all, the Jurors cannot aſſeſs ſeveral Damages againſt the Defendants, becauſe all is but one Treſpaſs, and made joynt by the Plaintiff by his Writ and Count. And although that one of them was more malicious, and de facto, did more and greater wrong than the others, yet all came to do an unlawful act, and were of one party, ſo that the act of one, is the act of all, of the ſame party being preſent. But in Treſpas againſt two, if the Jurors find one guilty at one time, and the other at another time, there ſeveral Damages may be taxed. But if the Plaintiff bring an Action of Treſpaſs againſt two, and declare upon a ſeveral Treſpaſs, his Action ſhall abate. And this is the diverſity between the finding of the Jury, and the confeſſion of the party. Several Damages. Vide Devant cap. 4.

And in Treſpaſs, where the Defendants plead ſeveral Pleas, all tryable by one Jury, and they find generally for the Plaintiff, the Jurors cannot ſever the Damages; if they do, their Verdict is vicious.

If the Declaration be of ſeveral Damages, touching every part in ſeveral, the Verdict ought to find the Damage ſeveral, as the Declaration is. Detinue.

So in Waſte, for every ſeveral parcel. Waſte.

So in a Premunire, againſt the principal and acceſſary. Præmunire.

Forcible Entry.

So in a forcible Entry, where some are found to detain forcibly, and others to enter forcibly.

Trespass.

If one be found guilty of several trespasses, the Damages may be entire.

Jeofail.

If one of the Issues be a Jeofail, and the Damages intirely assessed, 'tis ill in both.

Cost.

But Cost in these Cases must be intire.

Judgment *de melioribus dampnis.*

But in Trespass against two, where one appears and pleads not Guilty to a Declaration against him, with a simul cum, &c. and afterwards the other appears and pleads not Guilty to a Declaration against him also, with a simul cum, &c. Whereupon two Venire fac. issue out, and one Issue tryed after the other, and several Damages assessed: in Judgment of the Law, the several Juries give one Verdict, all at one time, and the Plaintiff hath his Election to have judgment de melioribus dampnis, by any of the Inquests. And this shall bind all, but fiat nisi una Executio.

Damages.

It is a Maxim, That in every Case where an Inquest is taken by the Mise of the parties, by the same Inquest shall Damages be taxed for all. And in Mich. 39 H. 6. f. 1. In an Action of Trespass against many, (who pleaded in Bar the Term before) and one of them made default, which was Recorded: There it is resolved by all the Court, That for saving of a Discontinuance, a Writ of Inquiry of Damages shall be awarded; but none shall issue out, because he shall be contributory to the Damages taxed by the Inquest,

Writ of Inquiry.

queſt, at the Miſe of the parties, if it be found for the Plaintiff: and if it be found againſt the Plaintiff, then the Writ of Enquiry ſhall iſſue forth.

257. And the reaſon wherefore no Writ ſhall iſſue out at firſt, to enquire of Damages, until, &c. is, becauſe that if a Writ ſhould iſſue out, and be executed, this is nothing but an Inqueſt of Office, and not at the Miſe of the parties, and yet this Inquiry (if it might be allowed) ought to ſerve for all the Damages; for inquiry of Damages ſhall not be twice, and the others which have pleaded to Inqueſts if the Iſſue be found againſt them, ſhall be chargable to thoſe Damages which are found by the Inqueſt of Office, and if they be exceſſive they ſhall have no remedy, although there be no default in them; for they cannot have an Attaint, becauſe it is but an Inqueſt of Office.

So in Treſpaſs or aſſumpſit againſt two, if one confeſs the Action, or let it go by nil dic. and the other plead, the Jury upon the Iſſue ſhall aſſeſs the Damages againſt both. Keeble 1 part, 623.

Damages by the firſt Inqueſt.

But in Treſpaſs againſt two, who plead Not Guilty, &c. ſeverally; and ſeveral Venire facias awarded, the Inqueſt which firſt paſſes, ſhall aſſeſs Damages for all, and the ſecond Inqueſt ought not to aſſeſs Damages at all, but that the Defendant ſhall be contributory to the Damages aſſeſſed by the firſt Jury, notwithſtanding he is not party to it; yet if theſe Damages be exceſſive, he ſhall have an Attaint,

(because though he is a stranger to the Issue, yet in Law, he is privy in Charge.) And so no Damage or Mischief can accrue to him in this Case.

Verdict, when to be supplied, by Writ of Inquiry, &c.

Now let us see when something is left out of the Verdict, which the Jury ought to have inquired of, whether it may be supplied by matter ex post facto; and how: And for this, know, That if Damages be left out of a Verdict, this omission cannot be supplied by Writ of Inquiry of Damages: for this would prevent the Defendant of his remedy by Attaint, which would be very mischievous; for then such omission might be on purpose, to deprive the Plaintiff of his Attaint, Lib. 10. 119.

Vide hic. cap. 6.

And the Rule is, That when the Court ex officio, ought to inquire of any thing, upon which no Attaint lies, there the omission of this, may be supplied by a Writ of Inquiry of Damages: as in a Quare Impedit, if the Jury omit to enquire of these four things, that, that is to say, de plenitudine, ex cujus presentatione, si tempus semestre transierit, and the value of the Church per annum, there the Plaintiff may have a Writ to inquire of these points. Dyer 241. 260. because of these no Attaint lies, as it is holden in 11 H. 4. 80. because that as to these, the Inquest is but of Office. But in all Cases, where any point is omitted, whereof no Attaint lyeth, there this shall not be supplyed by Writ of Inquiry, upon which no Attaint lyeth. And therefore in Detinue, if the Jury find Damages and Cost, and no Value as they ought, this shall not

Keeble 1 part, 882.

not be supplied by Writ of Inquiry of Damages, for the reason aforesaid. Ib. Et sic in similibus.

The Plaintiff was Non-suit. And upon the Statute 17 Car. 2. 7. the Jury inquired of the value of the Cattel, scil. 55 l. and da. 12 d. But they did not inquire what Rent was arrear: and it was moved to supply it by a new Writ of Inquiry, as in a Quare Impedit; but 'twas answered, that the Statute says, in case of a Non-suit, The same Jury shall enquire of the value of 259 the Cattel, and the Rent Arrear. Syderfin 380. Keeble 2 part, 409. In Replevin.

A Verdict upon an Issue or misnomer, pleaded in abatement, is peremptory, and if the Jury omit to find Costs, they cannot be supplied by a Writ of Inquiry, &c. Keeble 2 part, 545. Abatement. Costs.

But how then? What, shall the Plaintiff lose the benefit of his Verdict, because the Jury assessed no Damages (or did insufficiently assess them?) Certes in such Cases where Damages only are to be recovered, he must lose the whole benefit of his Verdict; but where any thing else is to be recovered, besides Damages, as in Debt, Ejectment, &c. he may release his Damages, and have Judgment upon his Verdict as to the rest. And so where Damages are to be recovered, if part of them are assessed insufficiently, and part well, he may have Judgment for those Damages well assessed. And oftentimes the insufficiency of the Declaration shall set aside the Verdict; as if in an Action upon the Case be brought upon two pro- Verdict set aside, because the damages not well assessed. Release Damages. Carters Rep. 51. Verdict set aside in part. For insufficiency in the Declaration.

promiſes, and one of them be inſufficiently laid, and the Verdict give intire Damages, this is naught for the whole; but if the Damages had been ſeverally aſſeſſed upon the ſeveral promiſes, then the Verdict as to the promiſe well laid, ſhould have ſtood. Lit. Rep. 61. Keeble 2 part, 488.

In the 11th Report, f. 56. Marſh brought a Writ of Annuity againſt Bentham, and the parties diſcended to Iſſue, which was tryed for the Plaintiff, and the Arrearages found, &c. But the Jurors did not aſſeſs any Damages or Coſt; which Verdict was inſufficient, and could not be ſupplyed by Writ of Inquiry of Damages: wherefore the Plaintiff releaſed his Damages and Coſts, and upon this had Judgment: upon which the Defendant brought a Writ of Error, and aſſigned the Error aforeſaid, ſcil. the inſufficiency of the Verdict, ſed Judicium affirmatur, becauſe the Plaintiff had releaſed his Damages and Coſts, which is for the benefit of the Defendant.

Releaſe of Damages where none were aſſeſſed.

In Detinue of Charters, or non detinet, Verdict for the Plaintiff and Damages, but the Jury did not find the value of the Deeds, and a Writ of Inquiry was awarded to that purpoſe and returned, and ruled good; and by Twiſden Juſtice, Debt againſt Executor, who pleads plene, &c. And it's found againſt him, and the Jury give no Damages, that can't be aided by Writ of Inquiry. Burton verſus Robinſon, Paſch. 17 Car. 2. B. R.

In

In Dyer 22 Eliz. 369, 370. In a Writ of Ejectione Cuſtodiæ terræ & hæredis, the Jurors aſſeſſed Damages intirely, which was inſufficient; for it lay not for the Heir, yet the Plaintiff releaſed his Damages, and had Judgment for the Land: And Note, That inſufficient aſſeſſment of Damages, and no aſſeſſing is all one.

Releaſe of Damages where they were not well aſſeſſed.

The Jury ought to aſſeſs no more Damages pro injuria illata, than the Plaintiff declares for: but they may aſſeſs ſo much, and moreover give Coſts, which is called Expenſæ litis; though in the proper and general ſignification Dampnum alſo comprehends Coſts of Suit, as the Entry reciting both Damages and Coſts, well affirms, ſcil. Quæ dampna in toto ſe attingunt cum, &c.

Damages and Coſts.

But if the Jury do aſſeſs more Damages than the Plaintiff declares for, the Plaintiff may remit the over-plus, and pray Judgment for the reſidue, as in the 10th Report, f. 115. In Treſpaſs the Plaintiff declared ad dampnum, &c. 40 l. at the Tryal the Jury aſſeſſed Damages occaſione tranſgreſſionis predict. ad 49 l. And for Coſts of Suit 20 s. Upon which Verdict the Plaintiff at the day in Bank, remitted 9 l. parcel of the ſaid 49 l. aſſeſſed for Damages, and prayed Judgment for 40 l. (to which Damage he had counted) with increaſe of Coſts of Suit, and had 9 l. de incremento, added by the Court, which in all amounted to 50 l. and had his Judgment accordingly: upon which a Writ of Error was brought, and the Judgment affirmed.

261.

More Damages than the Plaintiff declares for.

Damages remitted.

For

For as in real Actions, the Demandant shall not count to Damages, &c. because it is incertain to what sum the Damages will amount, by reason he is to recover Damages pendant le briefe; so in the case of Costs, he shall recover for the expences depending the suit, which being uncertain, cannot be comprehended in the Count, because the Count extends to Damages past, and not to expences of suit. For in personal Actions he Counts to Damages, because he shall recover Damages only for the wrong done, before the Writ brought, and shall not recover Damages for any thing, pendant le briefe. But in real Actions, the Demandant never Counts to Damages, because he is to recover Damages also, pendant le briefe, which are incertain.

Damages in real and personal Actions.

The Jury may if they will, assess the Damages and Costs intirely together, without making any distinction. 18 E. 4. 23. But then they must not assess more Damages and Costs, than the Damages are which the Plaintiff counts to; for if they do, the Plaintiff shall recover only so much as he hath declared for, without any increase of Cost, because the Court cannot distinguish how much they intended for Cost, and how much for Damage.

Damages and Costs intirely assessed.

As in 13 H. 7. 16, 17. One Darrel brought a Writ of Trespass, and counted to his damage twenty Marks, the Defendant pleaded Not Guilty, and the Jury taxed the damages and costs of suit joyntly to twenty two Marks, and the Verdict was held to be good for twenty Marks, and void for the re-

residue, because it doth not appear how much was intended for damages, and how much for costs, so that there may be more damages than the Plaintiff declared for, or less, and so the Court knows not how to increase the Cost; wherefore he shall have Judgment but for twenty Marks, by reason of the incertainty.

Where a special Verdict is not entred according to the Notes, the Record may be amended and made agrée with the Notes at any time, though it be three or four, &c. Terms after it is entred, Lib. 4. 52. Lib. 8. 162. Cro. 1 part, 145.

Verdict amended by the Notes.

In the Case of Turnor and Thalgate, Mich. 1658. B. R. It was said Per Cur' That special Verdicts may be amended by the Notes, but the Notes cannot be amended or inlarged by any Averment or Affidavit, for that were to find a Verdict by the Court. Yet in that Case, where the Notes were, That the Judgment, &c. was vacated prout per Rule, the Verdict was amended, vacated per Cur' prout per Rule; for so is implied in the Notes.

Notes. See Keeble 1 part 504, 907.

See a Verdict amended by the Notes, after Judgment and Error brought. Rolls 1 part, Report 82.

If the matter and substance of the Issue be found, it is sufficient, for precise forms are not required by Law in special Verdicts, (which are the finding of Lay Men) as in Pleadings which are made by Men Learned in the Law, and therefore intendment in many cases shall help a special Verdict, as much as a Testament, Arbitrement, &c.

Form. Hob. 54.

And

And therefore he which makes a Deputy, ought to do it by Escript; but when the Jury find generally, that A. was Deputy to B. all necessary incidents are found by this; and upon the matter they find, that he was made Deputy by Deed, because it doth tantamount. Lib. 9. 51. And in the 5th Report, Goodal's Case, It was resolved, That all matters in a special Verdict, shall be intended, and supplied, but only that which the Jury refer to the consideration of the Court.

Ill conclusion.

In all Cases where the Jury find the matter committed to their charge at large, and over more conclude against Law, the Verdict is good and the conclusion ill. Lib. 4. 42. And the Judges of the Law will give Judgment upon the special matter according to the Law, without having regard to the conclusion of the Jury, who ought not to take upon them Judgment of the Law. Lib. 11. 10. Vide hic. 400.

More 105, 269. Littletons Rep. 135, 94, 106.

As general as the Nar.

Where the Declaration in Trespass is, Cum aliquibus averiis, of a number uncertain, and the Verdict is as general as the Declaration, Cum aliquibus averiis, there the Verdict is good. Cro. 2 part, 662.

In Ejectione firmæ, where the Plaintiff declared of a Messuage and three hundred Acres of Pasture in D. per nomina, of the Manor of Monkhal, and five Closes per nomina, &c. Upon Not Guilty, the Jury gave a special Verdict, viz. quoad four Closes of Pasture, containing by estimation two thousand Acres of Pasture, that the Defendant was Not Guilty, Quoad residuum; they

they found matter in Law: And it was moved by Yelverton, That this Verdict was imperfect in all: For when the Jury find that the Defendant was Not Guilty of four Closes of Pasture, containing by estimation two thousand Acres of Pasture, it is incertain, and doth not appear of how much they acquit him. And then, when they find Quoad residuum, the special matter, it is uncertain what the residue is, so there cannot be any Judgment given; and of that Opinion was all the Court, wherefore they awarded a Venire facias de novo, to try that Issue. Cro. 2 part, 113.

Quoad Residuum, incertain.

Ejectione firmæ of thirty Acres of Land in D. and S. The Defendant was found Guilty of ten Acres, and Quoad residuum Not Guilty; and it was moved in arrest of Judgment, That it is uncertain in which of the Mills this Land lay; and therefore no Judgment can be given: sed non allocatur, and it was adjudged for the Plaintiff, for the Sheriff shall take his information from the party for what ten Acres the Verdict was. Cro. last part, 465. Diversitas pparet.

Quoad Residuum.

Where the Jury find Circumstances upon an Evidence given, to incite them to find Fraud, &c. yet the same is not sufficient matter upon which the Court can judge the same to be fraud, &c. Brownlow 2 part, 187. Yet in many Cases the Jury may find circumstances and presumptions, upon which the Court ought to judge. As to find that the Husband delivered Goods devised by the Wife. Upon this, the Court adjudged

Circumstances.

More 192. Carters Rep. 16.

ed that the Husband assented to the devise at first.

Postea amended, how.

Where a Verdict is certainly given at the Tryal, and uncertainly returned by the Clerk of the Assises, &c. The Postea may be amended, upon the Judges certifying the truth how the Verdict was given. Cro. 1 part, 338. See Keeble 2 part, 875. Where the Court would not compel the bringing in the Postea, 1 part, 346.

Ill Plea, made good by Verdict. Keebles 2 part 362.

In many Cases a Verdict may make an ill Plea or Issue good. As in an Action for Words, Thou wast Perjured, and hast much to Answer for it before God. Exception after Verdict for the Plaintiff, in arrest of Judgment: For that it is not laid in the Declaration, that he spake the Words auditu quamplurimorum, or of any one, according to the usual form: sed non allocatur; for being found by the Verdict that he spake them, it is not material, although he doth not say, in auditu plurimorum; whereupon it was adjudged for the Plaintiff. Cro. 1 part, 199. So want of a day in the Mar made good by Verdict. Keeble 3 part, 354,

See Cro. last part, 116. Where the Bar was ill, because no place of payment was alledged, yet the payment being found by Verdict, it was adjudged well enough; for a payment in one place, is a payment in all places. Keeble 1 part, 662, 771, 786, 793. Siderfin 306, 290, 341, 342, 379. Littletons Rep. 184, 200, &c. Modern Rep. 42, 43. Hardres Rep. 42, 43.

In

In an Action of the Case, for continuance of a Wall, by which the Plaintiffs Lights were stopped, in an ancient House. Per Cur. The Plaintiff ought to shew the Wall was new, and is not helped by Verdict. Keeble 1 part, 584.

Not Guilty is a good Plea after Verdict in assumpsit, so on non assumpsit the Jury may find the Defendant Guilty. Keeble 1 part, 795.

266. In an Action sur assumpsit, laid twenty years since, & non cul. infra sex annos, & replic. infra sex annos, which is a departure, yet the Verdict helps it. Keeble 1 part, 566.

In pleading riens avoit jour del brief, and said not ne unque puis, and the Jury find it, it is helped by the Verdict.

But Drake said, the same after Verdict was helped by the Statute of Jeofails.

The like 22 E. 4. 46. Que le Baron ne fuit seisie que Dower Jour del Espousal, &c.

So if an Executor plead Riens enter mains jour del breif, &c. and omit ne unque puis. 5 H. 7. 14.

Debt *versus* Heir. Debt brought upon a Bond against an Heir in the Detinet only, and upon riens per discent there was a Verdict for the Plaintiff, 'tis naught upon a Demurrur, but after Verdict is aided by the Statute 16 and 17 Car. 2. cap. 8. Which is (after several matters of substance) thereby Enacted to be amended after Verdict, and other matters of like nature, not being against the right of the matter in Suit, &c. shall not stay Judgment, Syderfin 342. Keebles 2 part, 259, 278, 309, 407. 1 part, 662, 771.

An Indictment of Extortion against a Bayliff, quod colore officij extorsive & injuriose he took Mony, and sheweth not the particulars; good per curiam, especially after Verdict. Keeble 1 part, 357.

Way.

In Information for not repairing a High Way in their Parish. Upon Non debent reparare, the Verdict found so, for the Defendant. The Court held the Issue ill, because 'tis contrary to Law, the Way being in their own Parish, they ought to have shewed who ought to repair, and if the Verdict had found that the Defendant ought to repair, it had been well enough, however after Verdict the Court gave Judgment, that the Defendant should be acquitted.

A repleader was denied. Keeble 1 part, 498, 829.

Trespass by Baron and Feme, de clauso fracto, of the Barons, and for the battery of the Feme, ad dampnum ipsorum. The Defendant, Quoad the clausum fregit, pleaded Not Guilty, Quoad the Battery justifies. And for the first Issue, it was found for the Defendant; and for the second, for the Plaintiff, and now moved in Arrest of Judgment, that the Declaration is not good, because the Baron joyns the Feme with him in Trespass de clauso fracto of the Barons, which ought not to be; but for the Battery of the Feme, they may joyn, whereto all the Court agreed; but it was moved, That in regard it was found against the Plaintiffs for this Issue, in which they ought not to joyn, and the Defendant is thereof acquitted, and the Issue is found against the Defendant, for that part wherein they ought to joyn: This Verdict has discharged the Declaration for that

Baron and Feme. *Vide* Keeble 1 part, 944. Count against Baron and Feme, of Trespass done, *cum averijs suis*, after Verdict allowed good. 946.

that part which is ill, and is good for the residue. As in 9 E. 4. 51. Trespass by Baron and Feme, for the Battery of both: The Defendant pleaded Not Guilty, and found Guilty, and Damages assessed for the battery of the Baron, by it self, and for the battery of the Feme, by it self, and Judgment was given for the Damages for the battery of the Feme, and the Writ abated for the residue. (And of that Opinion was Lea, Chief Justice, and Dodridge al contra.) And the same Law I conceive, if the Jury had found the Defendant Not Guilty of the battery to the Husband, but Guilty to the Wife. Cro. 2 part, 655. Palmers Rep. 338.

Rochel and his Wife brought an Action of Trespas and Assault in the Exchequer, Hill. 1659. against Steel and others, who pleaded Not Guilty, and the Verdict found Steel guilty of battery to the Wife, but found nothing concerning the Husband; wherefore Judgment was stayed; but the Barons held, That if the Jury had found the Defendants Not Guilty, as to the Husband, then the Verdict had helped the Declaration, and the Plaintiff should have had Judgment for the damages for the battery of the Wife. *Rochel* and his Wife against *Steel*.

Horton and his Wife declared in Trespass for beating the Wife, ad dampnum ipsorum, and good. Sydertin 387.

The Jury may find any thing that may be given in Evidence to them, as Records, either Patent, Statute, or Judgment. Things done in another County or Country; for which see Evidence before. Hob. 227. And of those things they ought to Of what a Verdict may be. Plo. Com. 411.

Incidents.

have Conuſance; they are to have Conuſance alſo, of all incidents and dependants thereupon; for an Incident is a thing neceſſarily depending upon another. Co. Lit. 227 b.

How conſtrued.

If the Verdict may any ways be conſtrued good, a conſtruction to deſtroy it ought not to be made. Carters Rep. 80, 94.

Outlaw.

If one of the Jury be Outlawed when the Verdict is found, the Verdict is not good, but may be reverſed by Error.

In a ſpecial Verdict, the Caſe in Fact muſt be found clear to a Common intent, without Equivocation. Vaughans Rep. 78.

Contents of a Deed.

If the Jury collect the Contents of a Deed, and alſo find the Deed in hæc verba, the Court is not to judge upon their Collection, but upon the Deed it ſelf. The Jury may find the Contents of a Deed or Will proved by Witneſſes. Ib.

Common.

Treſpaſs for diſturbing him of his Common belonging to an hundred Acres, and the Jury find Common for fifty, this is for the Plaintiff; otherwiſe upon an Avowry, or Quod permittat, which are founded upon the right, but the Treſpaſs is for Damages. Palmers Rep. 289.

Vide apres 403.

The Verdict may be againſt the Letter of the Iſſue, ſo the ſubſtance is found.

If the matter and ſubſtance of the Iſſue be found, it is ſufficient, though it be againſt the Letter of the Iſſue. As in the firſt, Inſtitutes, f. 114. b. A Modus decimandi was alledged by preſcription time out of mind, for Tythes of Lambs, and thereupon Iſſue joyned. And the Jury found, that before twenty years then laſt paſt, there was ſuch a Preſcription, and that for theſe twenty years, he had paid Tythe Lamb in ſpecie.

Preſcription.

ſpecie. And it was objected firſt, That the Iſſue was found againſt the Plaintiff, for that the Preſcription was general for all the time of the Preſcription, and twenty years fail thereof. Secondly, That the party by payment of Tythes in ſpecie, had waved the Preſcription or Cuſtom. But it was adjudged for the Plaintiff, for albeit the Modus decimandi had not been paid by the ſpace of twenty years, yet the Preſcription being found, the ſubſtance of the Iſſue is found for the Plaintiff.

Avoydance.

In an Aſſile of Darrein preſentment, if the Plaintiff alledge the avoydance of the Church by priva tion, and the Jury find the voydance by death, the Plaintiff ſhall have Judgment; for the manner of voydance is not the title of the Plaintiff, but the voydance is the matter. 1. Inſt. 282.

Deprivation.

If a Gardian of an Hoſpital bring an Aſſile againſt the Ordinary, he pleadeth that in his Viſitation he deprived him as Ordinary, whereupon Iſſue is taken, and it is found that he deprived him as Patron, the Ordinary ſhall have Judgment, for the deprivation is the ſubſtance of the matter. Ib.

(Cro) 40.

Breach of 20 Trees cut down for 10.

The Leſſée Covenants with the Leſſor not to cut down any Trees, &c. and binds himſelf in a Bond of forty pounds for the performance of Covenants. The Leſſée cut down ten Trées, the Leſſor bringeth an Action of Debt upon the Bond, and aſſigneth a breach, That the Leſſée cut down twenty Trées, whereupon Iſſue is joyned, and the Jury find that the Leſſée cut down ten: Judgment ſhall be given for the Plaintiff,

for sufficient matter of Issue is found for the Plaintiff to forfeit the Bond. Ib.

(C.9.25)

And this Rule holds in Criminal Causes: For if A. be appealed, or indicted of Murder, viz. that he of malice prepensed killed J. A pleadeth that he is Not Guilty, Modo & forma, yet the Jury may find the Defendant Guilty of Manslaughter without malice prepensed, because the killing of J. is the matter, and malice prepensed is but a Circumstance. Plo. Com. 101.

Indictment of Murder, and Verdict finds Manslaughter. Siderfin 325.

(C.9.21) *Modo & forma.*

And generally where modo & forma, are not of the substance of the Issue, but words of Form, there it sufficeth, though the Verdict doth not find the precise Issue.

Do.

As if a Man bring a Writ of Entry in casu proviso, of the Alienation made by the Tenant in Dower to his disinheritance, and counteth of the Alienation made in Fee, and the Tenant saith, That he did not Alien in manner as the Demandant hath declared, and upon this they are at Issue, and it is found by Verdict, that the Tenant alienated in Tail, or for term of another Mans Life. The Demandant shall recover, yet the Alienation was not in manner as the Demandant hath declared. Littleton, Sect. 483.

Alienation.

Do.

Also if there be Lord and Tenant, and the Tenant hold of the Lord by Fealty only, and the Lord distrain the Tenant for Rent, and the Tenant bringeth a Writ of Trespass against his Lord, for his Cattel so taken, and the Lord plead that the Tenant holds of him by Fealty and certain Rent, and for that Rent behind he came to dis-

Trespass by the Tenant against the Lord.

distrain, &c. And demand Judgment of the Writ brought against him, Quare vi & armis, &c. And the other saith that he doth not hold of him in manner as he supposed; and upon this they are at Issue. And it is found by Verdict, that he holdeth of him by Fealty only, in this case the Writ shall abate, and yet he doth not hold of him, in manner as the Lord hath said; for the matter of the Issue is, Whether the Tenant holdeth of him or no; for if he holdeth of him, although that the Lord distrain the Tenant for other services which he ought not to have, yet such Writ of Tresspass, Quare vi & armis, &c. doth not lye against the Lord, but shall abate. Littleton, Sect. 485.

Also in a Writ of Tresspass for Battery, or for Goods carryed away, if the Defendant plead not Guilty in manner as the Plaintiff supposeth, and it is found that the Defendant is Guilty in another Town, or at another day, than the Plaintiff suppose, yet he shall recover. *The Verdict may find the Defendant guilty of the Tresspass at another day or place.*

So the Jury may find the Conspiracy at another day, for the day is but form. *Conspiracy.*

272. In Battery, if the Defendant justifie at another day with a Traverse, Devant & apres, he may be found Guilty at another day. *Battery.*

If the Defendant by his Plea agrée with the Plaintiff in the day, year and place, and the Plaintiff reply, De son tort demesn sans tiel cause, and the Defendant prove an Assault by the Plaintiff, the Plaintiff shall not give in Evidence a Battery at another day. Rolls. tit. Tryal 687. Vide devant cap. 11. *Son assault demesn.*

And ſo in many other Caſes theſe wozds, ſcil. in manner as the Demandant or the Plaintiff hath ſuppoſed, do not make any matter of ſubſtance of the Iſſue. Litteton Sect. 485.

Modo & forma, when words of form. Siderfin 357.

And 'tis a Rule, That where the Iſſue taken goeth to the point of the Writ oz Action, there Modo & forma are but wozds of fozm, as in the caſes afozeſaid.

When of ſubſtance, and muſt be found by the Verdict.

But when a Collateral point in pleading is traverſed, as if a Feoffment be alledged by two, and tyis is traverſed Modo & forma; and it is found the Feoffment of one, there Modo & forma is material: ſo if a Feoffment be pleaded by Dæd, and it is traverſed Abſque hoc quod feoffavit Modo & forma, upon this Collateral Iſſue, Modo & forma are ſo eſſential, as the Jury cannot find a Feoffment without Dæd. Co. Littleton, 282.

So in *non aſſumpſit modo & forma*, upon an *Indebitatus aſſumpſit*, there *modo & forma*, were not material. *Secus*, when the Action is upon a Collateral promiſe.

Treſpaſs *Quare vi & armis*, lies not againſt the Lord for diſtraining his Tenant, without cauſe.

But here is a diverſity to be obſerved, That albeit the Iſſue be upon a Collateral point, yet if by the finding of part of the Iſſue, it ſhall appear to the Court, that no ſuch Action lyeth foz the Plaintiff, no moze than if the whole had bæn found, there Modo & forma, are but wozds of fozm, as in the afozeſaid Caſe of the Lozd and Tenant, it plainly appears; foz it was all one, whether the Tenant held by Fealty only, oz by Fealty and Rent, becauſe if either was true, the Tenant could have no Treſpaſs, Quare vi & armis, againſt the Lozd in that Caſe,

Case, by the Statute of Marlbridge. Cap. 3. Vide hic Devant.

After the Verdict recorded, the Jury cannot vary from it, but before it is recorded they may vary from the first offer of their Verdict. And that Verdict which is recorded shall stand. 1 Inst. 227. Plo. Com. 212.

Jury cannot vary from their Verdict when it is recorded.

There is also a Verdict given in open Court, and a privy Verdict given out of Court, before any of the Judges of the Court, so called, because it ought to be kept secret and privy from each of the parties, before it be affirmed in Court.

Open Verdict and privy Verdict.

Because the Jury may vary from their private Verdict, as if that find for the Plaintiff, the open Verdict may be for the Defendant, and this shall stand, and the private Verdict shall not be deemed a Verdict; for the Jury are charged openly in Court, and in Court their Verdict ought to be received, and this which they pronounce openly in Court, shall be adjudged their Verdict.

The Jury may vary from a private Verdict.

And although it is usual to take the Verdict secretly, when the Jurors are agreed, yet this is not of necessity of Law, but of courtesie of Law for the ease of the Jurors, and in this case, their saying shall not be their Verdict till it is openly pronounced in the Court; for when they come in the Court, the Plaintiff shall be demanded, and then may be non-suited; but when they give their Verdict secretly, the Plaintiff is not demandable, nor can be then non-suited, but he may be non-suited, when the Verdict of right ought to be rendred. Ergo, the force is in the giving of the Verdict in the Court, and not elsewhere.

And

Bro. tit. Verdict. 12.

And also in the Court it self, if they pronounce their Verdict, they may change it, if they be mistaken, or if it be not full in Law, or for some other reasonable cause immediately perceived. Therefore if they may vary, and contradict their first Verdict given in open Court, a fortiori upon better advisement, they may do so when their first Verdict was given out of Court, and they not discharged; for they be in the custody of the Baily, till they be discharged in Court. Plo. Com. 211. More 33.

Jury shall give but one Verdict in the same Cause.

The Jury having once given their Verdict, although it be imperfect, shall never be sworn again upon the same Issue (unless it be in case of Assise, when the party is to recover by view of the Jurors.) But there must be a Venire facias de novo. Cro. 2 part, 210.

Verdict good in part.

If a Verdict be good in part, and naught in another part, it shall stand in part, and a new Inquest shall be for the rest. Bro. tit. Verdict. 89.

What permitted in Pleading for the Juries direction in their Verdict.

For the Juries direction in their Verdict, greater liberty is permitted in pleading a matter doubtful in Law; for, a Traverse (for this reason) may be omitted. As in Debt against an Executor, it is a good Plea to say, Administration was committed to him, and therefore he should be named Administrator, and not Executor, without traversing that he is not Executor; for the Lay-People know no difference, between one administring as Executor, and one administring as Administrator. 9 E. 4. 33.

For

For this Reason likewise, the special matter may be pleaded together with the general Issue, &c. As that the Obligation put in suit was sealed by him, and delivered to A. to keep till certain Indentures were made between the Plaintiff and him, before which Indentures made, the Plaintiff took the Obligation out of the possession of A. so is not his Deed. This is good, and yet by this general conclusion, the matter precedent shall not be waved, for it were perilous to put the special matter in the mouth of Lay-People. 9 H 6. 38.

A special *non est factum.*

Damages in Trespass, if a Release be pleaded in a Foreign County, and tryed there for the Plaintiff, there also shall Damages be assessed by the same Jury. For where the principal is tryed, there also shall the Accessary and Incidents be enquired of. I need use no other Instances to illustrate this, than the Case abovesaid.

Where the Issue upon a collateral Matter is tryed in a foreign County, Hundred, *&c.* where the Principal and Accessary shall be tryed.

They may find a Condition to defeat a Freehold of Land, although it be not pleaded; but of things in Grant, they must also find the Deed of the Condition.

21 Ass. 14. What things the Jury may find.

Upon Traverse of a Lease Modo & forma, the Jury may find a Lease of another date, although the date be mistaken in the Pleading, but not a Lease made by another, than from whom was pleaded; for this is out of the Issue in matter and form.

Modo & forma.

In an Assise of Rent, the Jury may find that the Rent was granted with an Attornment, although no specialty be shewed.

Rent.

Matter of Record. A Fine or Recovery may be found by the Jury, without shewing of it under Seal. The Jury cannot find against what is admitted by the Record. Siderfin 271.

Record. If the Verdict be contrary to a matter of Record, it may be set aside as naught.

Inspection. If a party be found by inspection to be within Age, the Verdict that finds him of Age shall be holden for none.

Jeofail. A Verdict finding matter against the Record is a Jeofail. 11 H. 6. 42.

Divorce. They may find a Divorce, which is a Record in the Spiritual Court, but not by our Law.

Attainder. The Verdict found an Attainder of Felony not pleaded, nor given in Evidence Sub pede Sigilli. 26 Ass. 2. And the Court took it ill.

So of a Fine and Recovery where found not pleaded, nor given in Evidence sub pede sigilli. 26 Assise 5.

The Jury is not to inquire of this which is agreed by the parties.

Dower. As in Dower, if the Tenant says he has been always ready to render Dower, and the Issue be if the Husband dyed seised, the Jury is not to enquire if the Estate was dowable, for this is confessed.

Wast. If the Defendant doth not deny the Wast, but pleads another matter, scilicet nul tiel vill lou, &c. The Jury is not to inquire of the Wast, but give Damages although no Wast be made.

Award. In Debt upon a Bond, with a Condition to perform an Award, and the Defendant plead Nullum fecit Arbitrium, and the Plaintiff

tiff reply, fecit Arbitrium, and ſets it forth, and the Defendant rejoyn Nul tiel award, the Jury cannot find any matter dehors to make the Award void in Law, which doth not appear within the Award pleaded; As that the Releaſe awarded would diſcharge the Bond of the ſubmiſſion, for nothing is in Iſſue, but whether ſuch an Award was made in fait, as is alledged, neither could this matter be alledged by any Rejoynder; for it would have been a departure from the Plea, and a Jury cannot find that which would have been a departure, becauſe out of their Iſſue. But in this Caſe, if the Defendant would have took advantage of it, he ought to have pleaded all this matter in his Barr, and not have ſaid Nullum fecit Arbitrium; for 'tis a departure in the Rejoynder to acknowledge an Award which was denied in the Plea.

In Debt for twenty ſhillings, and the Iſſue be, ſolvit ad diem, and the Verdict be Quod debet the twenty ſhillings, this is not good, becauſe it is not direct but by Argument. How the Jury ought to find their Verdict, and what ſhall be intended.

In Debt upon an Obligation, if the Defendant ſay, That he is a Lay-Man, not lettered, and 'twas read as an Acquittance, Et iſſint nient ſon fait, if the Jury find he knew what he did, and that it was a Bond, and he was willing to be bound, this is no good Verdict, becauſe they ought preciſely to find if it was his Deed or not. *Nient* Lettered.

1.

Custom.

If the Issue be, whether where a Copyhold is granted to three for the Lives of two, if he which dye seised, &c. ought by Custom to pay an Heriot or not, and the Jury find that there was never any such Estate granted in the Mano^r, this is not good for the reasons aforesaid.

So if the Issue be, if by custom an Estate tayl may be granted, and the Jury find that it may be granted in Fæ, which is greater, yet 'tis not good.

Tresp. Trespass.

In Trespass for taking and cutting his Leather, if the Defendant justifie as a Searcher, and cut it for the better search More Scrutatorum, without any other damage; and the Plaintiff reply, De injuria sua propria absq; hoc, that he cut it More Scrutatorum, upon which Traverse Issue is joyned, and the Jury find that the Defendant cut it as the Plaintiff has alledged; this is no good Verdict, because 'tis not any Answer to the Issue but by Argument.

Battery.

In Trespass and Battery in A. to find Not Guilty in A. is not good; for it ought to be generally Not Guilty.

Riens per Descent.

Upon this Plea, if the Plaintiff reply That he hath divers Lands in D. per descent, and the Jury find he had divers Lands by descent, this is good, without finding what; for 'tis not material, in regard upon this false Plea a general Judgment, is to be without having respect to the Assets.

Incertain.

Of

Of five Acres, if they find the Defendant guilty in eight pieces, de terre parcel tenementorum prædict, 'tis a void Verdict because uncertain, and no Execution can be made of pieces, Ejectment.

In Ejectment of a Manor, on non culp. The Verdict was for the Plaintiff for the Manor, and Quoad servitia non culp. 'Twas objected that the Verdict was not for the Plaintiff for the Manor, because as to the services 'twas for the Defendant; but 'twas answered the last part as to the services was void and surplusage. Siderfin 232. Keeble 1 part, 810. Manor. (C.9.24)

In Case upon non Assumpsit pleaded, if the Jury find that the Defendant non Assumpsit; yet if two Witnesses say true, then we find that he did Assume. The first shall stand for the Defendant, and the last words are void; and surplusage shall not vitiate. Verdict special. Surplusage.

If upon a Lease of twenty Acres and the Jury find Quod dimisit ten Acres tantum, and the conclusion of the Verdict is, Et si, super totam materiam Curiæ videbitur quod Defendant dimisit twenty-Acres, then they find for the Plaintiff; and if not, then for the Defendant, this is repugnant, and so the Verdict is void in all. Ejectment. (G.9.3)

In ejectione firmæ de 7 Messuagijs sive Tenementis, and Verdict pro querente. 'Tis ill for the incertainty, and the Verdict doth not help it; and Hale refused to let the Jury find for the Plaintiff, for the Messuages, and non cul. for the Tenements; but by Twisden, if it had been de uno Messuag. sive tenemento vocato, the Black Swan, it had been (W.7)

been good, because the last part makes it certain. Syderfin 295. Keeble 2 part, 80. Cro. 3 part, 186.

Certain. Damages (K) mp

To Assess Damages incertainly is void; as to say we Assess forty pound, if we must by Law, if not then but three pound, this is void.

(M. ff. 2) 8. Damages.

Indebitatus assumpsit, to Assess Damages occasione debiti prædicti is good, although it ought to be occasione non performationis, &c.

(U 2 f) 7. Information.

In an Information upon the Statute 39 El. Cap. 11. for Dying with Logwood, by which he lost twenty pounds for every Offence; upon Not Guilty, if the Jury find him Guilty for using this against the Statute for forty days, by which he lost this is not good, because he forfeits twenty pounds for every time, and the number of times do not appear.

(U. ff 2) 1.

If the Jury find the words in the Will, and yet do not find the Will, the Verdict is not good.

(X f) 1.

If they first find the special matter, and then find the Issue generally, the special matter is hereby waved.

(Y f a) Where a Special Verdict shall be good by intendment.

If the Jury find that J. S. was seised in Fee, and Deviled the Land to J. D. although they do not find that the Land was held in Socage, yet this is good; for this shall be intended, this being a Collateral thing, and this being the most common Tenure.

(S f) *Devastavit*:

Verdict of Eloynment and Conversion to his own use, proves a Devastavit, Keeble 2 part, 488.

If

If they find that he was seised and made his Will in hæc verba, &c. although they do not find that he Devised the Land as in the former; yet this is good by intendment. Will. (4 R 5.

But if a thing is left out, and cannot be intended, the Verdict is not good. (Z. b)

If the Issue be whether the Sheriff took J. S. and kept him in Prison in Execution for certain Debt and Damages by force of a Capias ad satisfaciendum, and the Jury find that he took him by force of an Alias Capias ad satisfaciendum, &c. although they do not find that he kept him in Execution for the Debt and Damages aforesaid, according to the Issue, yet this is a good Special Verdict; for it shall be intended; for the Consequence is necessary from this which is found, for he could not take him, but that he must be in Execution. Vide several instances of this, Rolls tit. Tryal, 697. &c. (4 R 3. 3. (C. 9) 43. (4 R 3) 3. (13 9) 2.

If the Jury find that J. S. was seised in Fee, and made his Will in hæc verba, and that he afterwards dyed; although they do not find that he dyed seised, yet it shall be intended that he dyed seised, and so good. Will. (4 R 3. 5.

If they find that A. did Bargain and Sell, &c. although they do not find any consideration, yet this shall be intended. Bargain and Sale. (A. 9) 6.

So if they find that such Persons Authorizati virtute literarum patentium Dominæ Elizabethæ, &c. and do not find that the Letters Patents were under the Great Seal, yet this shall be intended. Letters Patents. (A. 9) 9

Intent.

Verdicts of Lay-Men shall be taken according to their intent, and need not so precise a form as in Pleadings. Lib. 4. 65. Hob. 76. Siderfin 27, 75. Littleton Reports 133. &c.

(A 9) 14.

Therefore if the Jury find a Recognizance in nature of a Statute Staple in this manner, That the Conusor came before R. O. Recorder of London, and T. O. Mayor of the Staple, Et recognovit se debere to B. 200 l. and do not say, Secundum formam Statuti, &c. nor Prescriptum Obligatorium, &c. although the Statute of 23 H. 8. provide, That it shall be by Bill Obligatory, sealed with three Seals; and here it doth not appear, that there was any Bond or Seal, nor that it was according to the Statute; yet these things shall be intended, they having found a Recognizance before the Mayor and Recorder.

amend. (N. a)

Notes.

A special Verdict may be amended by the Notes. Keeble 1 part, 907. See a Coroners Inquisition amended by his Notes.

(B 9) 4

Where a special Conclusion of a special Verdict shall aid the Imperfections of it.

If the Jury find a special Verdict, and refer the Law upon that special Matter to the Court, although they do not find any title for the Defendant, which is a Collateral thing to the point which they refer to the Court, yet the Verdict is good enough, for all other things shall be intended, except this which is referred to the Court. Lib. 5. 97. Littletons Rep. 135. &c. Keebles 2 part, 362, 412.

(B 9) 1.

In Ejectment, If the Plaintiff declare upon a Lease made by A. and the Jury find a Special Verdict, and matter in Law upon

a

a power of Revocation of Uſes by an Indenture and Limitation of new Uſes, and then a Leaſe for Years made to the Plaintiff by the Leſſor in the Declaration, and another, in which there is an apparent variance; but they conclude the Verdict, and refer to the Court, whether the Grant of a new Eſtate found in the Verdict, be a revocation of the firſt Indenture, or not. The ſpecial concluſion ſhall aid the Verdict, ſo that the Court cannot take notice of the variance betwæn the Leaſe in the Declaration and Verdict, becauſe the doubt touching the Revocation, is only referred to the Court. And although they refer to the Court, whether this be a Revocation of the firſt Indenture, and not of the former Uſes, and Limitation of new Uſes, as it ought to be; yet in a Verdict this is good, for their intention appears.

So note a difference betwæn a ſpecial Concluſion and Reference to the Court, and a general Concluſion, and Reference to the Court. Vide hic 379. (B. 9) 1.

In Debt for forty ſhillings for a Horſe ſold, and the Jury find forty ſhillings Debt, for two Horſes ſold; this is found againſt the Plaintiff, for this is not the ſame Contract. For whom the Verdict ſhall be ſaid to be found. (C. 9) 1.

So in Debt for twenty pound, if the Jury find forty pound Debt, this is againſt the Plaintiff. (C. 9) 3.

In Debt for twenty pound for Wood ſold, and the Jury find the Bargain was for twenty marks; the Plaintiff ſhall not have Judgment for this variance. (C. 9) 5.

(C.9) 6. So in Debt for Rent upon a Demise of two Acres, and the Jury find it upon the Demise of one Acre, the Plaintiff shall not have Judgment.

7. But in Debt for twenty four pounds eight shillings, received for the Plaintiffs use, if the Jury find the Defendant ows twenty four pounds, but not the eight shillings, the Plaintiff shall have Judgment; for perhaps he had paid the eight shilling.

8. In an Action upon the Case against A. if the Plaintiff declares, That by Custom, &c. amongst Merchants, &c. If two are found in Arrearages upon Accompt, and they assume to pay this at certain days, that any one of them may be charged for the whole by himself, and then shews the Accompt of A. and B. who are found in Arrear, in so much, &c. And promised to pay this at certain days, but paid it not, and now he brings his Action against A. although upon Non Assumpsit pleaded, it be found that the days of payment are mistaken, yet the days being past the Action lyes, because the Law makes the duty upon the Accompt; for which after the days an Action lyes.

(C.9) 13. In Debt upon a Lease of twenty Acres, The Defendant pleaded the Lease was of twenty four Acres, sans ceo que il demise les 20 Acres tantum. The Verdict found the Demise of twenty one Acres only; 'twas looked upon as a Jeofail, and found for neither Plaintiff nor Defendant. Dyer 32.

(C.9) If the Issue be Assets in Sale, and the Verdict be Assets in Dale, 'tis a good Verdict,

dict, for the place is not material. Keeble 1 part, 662.

So of an Accompt before A. and B. An Accompt found before A. tantum is good.

In Escape of Baron and Feme, and the Jury find of the Baron only, 'tis good, and so in other Actions grounded upon a tort to find part. But upon a Contract the Verdict ought to pursue the Declaration, otherwise in Debt upon a Lease for years, for Rent. Siderfin 5, 6. Keeble 1 part, 371.

Issue whether Mony was paid for Blackacre. Verdict, that it was paid for Blackacre and Whiteacre, good: so per Twisden, whether a Common was from Lady-day to Michaelmas, and the Verdict finds from Christmas to Michaelmas day, tis good. Keeb. 1 p. 192.

Indictment of forcible Entry and Detainer, A Verdict of forcible Entry and forcible Detainer is sufficient to grant Restitution upon. Keeble 1 part, 419.

Barwel prayed Bill of forcible Entry and Detainer, found Ignoramus as to the Detainer, and Billa Vera as to the Entry, might be quash'd, which was done, for the Offence as charged being intire, the Grand Jury cannot apportion their Verdict as the Petit Jury on Indictment may. Keeble 1 part 931.

Where all is to be given in Damages, the Jury are Chancellors, and may give so much as the Case requires in Equity. Damages.

In Detinue of a Bond of 100 l. if the Jury find that he received a Bond of a greater or less Sum, the Verdict is for the Defendant. Detinue.

Promise. So in a promise to do two things, if the Jury find but one of them, 'tis for the Defendant.

Ejectment. Otherwise in Ejectment upon a Demise of ten Acres, if the Jury find a Demise of less, the Plaintiff shall have Judgment.

Prescription. *Vide* Devant. 385. If the Issue be upon a Prescription for Common belonging to a Messuage and two hundred Acres of Land, fifty of Meadow and fifty of Pasture; if the Jury find Common belonging to the House, twenty Acres of Meadow, and twenty of Pasture in two of the Hills, and not in the rest, the Prescription is not found.

Trespass. Case. If part of the Trespass or wrong be found 'tis sufficient in Trespass or an Action of the Case upon a Tort; as by a Commoner, for putting and depasturing Cattel in the Common.

Audita Querela. If the Issue be whether all the Lands in Execution, were the Estate of the Father in Tail, or in Fee, and part is found in Tail, and part in Fee; Judgment shall be given for the Defendant who pleaded the seisin in Fee.

Ejectment. If the Plaintiff declares upon a Demise made the first of May, to commence at Michaelmas next, if the Jury find a Lease made at any other day before the Feast, 'tis found for the Plaintiff; for the day of making is not material.

Otherwise of a Lease for years in Possession; as of a Lease made the fifth of May Habend. for three years from Lady-day before; and the Jury find a Lease made the 15th

15th day of May, for three years, from the same Lady-day; for this is a Lease in Possession.

In false Imprisonment in Middlesex, and the Defendant justifies in London, to which the Plaintiff saith, The Defendant took him in Middlesex, de son Tort demesn, and Issue upon this, and the Jury find the Defendant took him in Middlesex lawfully upon a Writ, yet this is for the Plaintiff; for the Issue is upon the place, and not upon the Tort, for that is confessed by the Pleading, if the taking was in Middlesex. Imprisonment. (C.9) 31.

In Debt for twenty pound, and the Jury find forty pound, the Plaintiff shall not have Judgment, the reason seems to be because it cannot be the same Debt which is intire; but upon another Contract, which is mislaid. Debt. (C.9) 3.

If the Issue be payment after Execution, and the Jury find payment before, yet the Issue is proved; for payment before is payment after. *Audita Querela. Vide* 198. (C.9) 34.

In Debt upon a Bond, bearing date the 25th of June, upon Non est factum, if the Jury find it his Deed, but that it was delivered eight days after the date, this is found for the Plaintiff. Obligation. (C.9) 35.

If the Issue be that two made the Feoffment, or two were Church-wardens, &c. and the Jury find but one, &c. the Issue is not found. Joynt and several. 37. 38.

If the breach of Covenant or Wast be assigned in cutting twenty Trees, and the Jury find but ten, yet the Plaintiff shall have Judgment. Obligation: Covenant. Wast. 40.

Totum & Pars.

If in Replevin, &c. the Jury find that part of the Cattel were Levant and Couchant, and part not, and the Issue is upon all, the Issue is not found.

In Debt, tam quam, on the Statute 1 Jac. cap. 22. for cutting Oaks unseasonably, on not Guilty, and Verdict for the Plaintiff, 'twas excepted in Arrest of Judgment, That the Jury found the value of each Tree six shillings eight pence, but do not cast up the sum. Sed per curiam in this Issue 'tis needless; but had the Issue been nil debet, they must cast it up, and not leave it to the Court, Keeble 1 part, 835.

Indictment.

Keeling excepted to an Indictment of Assault, Battery and Wounding. The Jury find him Not Guilty de transgres. & insult. pred. Sed per cur. 'tis well enough, and comprehends the whole, contra if it had been de insult. pred. only, and the Presentment, Traverse and Tryal was all at the same day and Sessions, ex assensu, being a favour to the Party. Keeble 1 part, 879.

Ejectment. Void in part.

In Ejectment for him who pleaded all, of fourteen Acres, and the Jury find Guilty of twenty, the Plaintiff shall have Judgment for the fourteen, and the Verdict is void for the residue.

Information. Usury.

In an Information upon an usurious Contract by two, 'tis not sufficient to find a Contract by one. Otherwise where the Tort and offence is several, as against two upon the Statute 4 E. 6. Pro emptione butiri, and selling it by Retail, &c. and so in an Action upon the Case in Nature of Conspiracy, and for words laid twice in one Declaration.

This

This will put in Issue the manner as well as the matter, where the manner is material; as the time of the Fact and other Circumstances. *Modo & forma.*

The Plaintiff teplies that W. made a Lease to him 30 Martij Habend. from Lady-day last, and Issue Modo & forma, and the Jury find a Lease made the 25 Martij Habendum extunc for a Year, this is good, although the time of making and commencement of the Lease are mistaken, inasmuch as extunc includes the Feast. Yet because a sufficient Title and Lease is found for the Plaintiff to put in his Cattel, this is sufficient, this being the substance, and the Modo & forma shall not put the circumstances in Issue. Replevin. Lease. (C. 9) 54.

So in Trespass, if the Defendant justifie the putting in his Cattel for Common, which he claims from Pentecost to a certain time every Year, which is traversed Modo & forma, and the Jury find that he had Common in Vigilia Pentecostis in festo, and the day next to this to the time, this is found for the Defendant. 55.

But otherwise in these Cases in an Assise of Common, because there he ought to recover his Title. 56.

In Debt for Rent, if the Defendant plead an Entry by the Plaintiff, before the Rent was due, scilicet such a day which was after, and Issue upon the Entry Modo & forma, and the Jury find for the Defendant, he shall have Judgment, for the scilicet is void, and the Modo & forma go to the matter. See after. 58.

In

Non est factum. In Debt upon a Bond, and the Defendant plead Non est factum, and the Jury find the Bond made joynly by another with the Defendant, the Plaintiff shall have Judgment; for the Defendant should have pleaded this.

Devise. If a Devise be pleaded absolute, if the Jury find a Devise upon a Condition Precedent, 'tis not good.

Riens per Discent. In Debt against A. as Daughter and Heir to B. and the Defendant plead Riens per discent of B. and the Jury find that B. was seised in Fée and dyed, having Issue the Defendant his Daughter, and his Wife with Child of a Boy, who was afterwards born alive, and dyed one hour after, this Issue is found against the Plaintiff, because the Defendant had the Land as Heir to her Brother, who was last seised, and not to the Father, and so the Defendant had not the Land by Discent from the Father, but from the Brother, yet this is Assets in her Hands if it had been specially pleaded.

Error. In a Writ of Error brought by him in remainder in Tayl to Reverse a Fine, if the Defendant plead in bar of the Writ of Error, a Common Recovery by the Tenant in Tayl; to which the Plaintiff replies, That at the time of the Recovery suffered, he himself was Tenant to the Præcipe, and so the Recovery void, upon which Issue is joyned, and the Jury find that he was Tenant of part, but not of other part. This Issue is partly found for the Plaintiff, and partly for the Defendant, so the Court shall proceed to the examination of the Error,

Part.

roz, foz that whereof he was found no Tenant; but 'tis a good bar of the Writ of Erroz, foz that whereof he is found Tenant to the Præcipe.

In Assumpsit to pay Mony upon request, and Issue upon this, if the Jury find the Plaintiff promised to pay the Mony, but do not say upon request, noz Modo & forma, 'tis not found foz the Plaintiff. Promise. (C. 9. 10)

In Ejectment of a Manoz, if the Jury find that there were no Freeholders, and so 'tis no Manoz in Law, yet being a Manoz by Reputation, and so the Tenements pass by the Leale; therefoze this Verdict is found foz him who pleads the Leale of the Manoz, foz the substance is, whether any thing was demised oz not. If the substance of the Issue be found, 'tis sufficient Manor. (C. 9. 25) (D. 9) 7.

In an Information of Extoztion against the Goaler of the Goal, a Prison of the Castle of Maidston; the Jury found there was no Castle, but that there was a Goal; this was foz the Plaintiff, because Goal is the substance. Goal. (D. 9) 6.

If the Issue be whether the Defendant had Accompted before R. and W. Auditozs assigned by the Plaintiff, and the Jury find an Accompt before R. only, he Issue is found foz the Defendant; foz the Accompt is the Effect of the Issue. Vide Rolls Tit. Tryal 707. &c. Accompt. (C. 9) 46.

If eleven agree, and the twelfth will not, the Verdict of the eleven cannot be taken, but the Court may carry the Jurozs with them in Carts until they are agreed. 41 Ass. 11. Jury agree. (D. 9) 9. 10.

(E. 9) Verdict altered.

A privy Verdict may be alered in open Court.

In an Extendi fac. upon a Statute, if the Jury deliver their Verdict in Writing, they may afterwards make it more formal, but they cannot alter it in substance, for it is a compleat Verdict by the delivery. So of Presentments, &c.

(F. 9) 1. Fine and Non-claim.

A Fine pleaded in Bar, and that after the death of A. scil. 1 August, 3 Car. B. Father of the Plaintiff was alive, & in plena vita & remansit infra hoc Regnum infra quatuor Maria, &c. apud W. in Com. D. and no Entry or Claim within five years after, and the Plaintiff replies and takes Issue, Que il non fuit & remansit infra hoc Regnum Angliæ modo & forma, &c. And the Jury find Quod non fuit & remansit infra hoc Regnum Angliæ, 1 August, 3 Car. but that he was there 1 Maij, 4 Car. and remained there a Month, and refer to the Court, An fuit & remansit infra hoc Regnum modo & forma, &c. This Issue is found for the Defendant, for the matter and substance of the Plea is, whether he was within the Realm after the death of A. and five years before Entry or Claim per him or the Plaintiff, and modo & forma shall not make the day material. Rolls Tit. Tryal 713.

Modo & forma.

(G. 9. 10) Judgment, Arrest, at what time.

Judgment upon a Demurrer, and a Writ of Inquiry executed at the return, the party may shew any thing in Arrest of Judgment; for Judgment is not compleat until the last Judgment. The first is but an Award: A Man may plead any thing in Arrest of Judgment after a Verdict, which

which will make Error if the Judgment be given.

In Debt upon a simple Contract against an Executor, if he will not plead in Abatement, but other matter which is found against him, he shall not afterwards alledge that he is not chargable in Arrest of Judgment. (9) 2.

So in Debt against Executors upon Arrearages of Accompt, where they are not chargable. 3.

That which appears ill upon the same Record, but not a matter of Fact, which doth not appear upon the Record, because the parties cannot by the Issue. As that a Juror was challenged, and yet served on the Tales, for this cannot appear without alledging matter of Fact. Nor that the Defendants Attorny had no Warrant. But if there be any irregular or foul practice, this may be offered to set aside a Judgment. What may be alledged. (K) (9) 1. 2. 3. 4.

In Error upon Judgment in Durham, in Debt upon Bond to pay twenty pounds, The Defendant pleaded solvit ad diem, not saying where; a Verdict thereupon is void, because there is no Visne, and so no Tryal. Keeble 2 part, 620. Visne. (H. a. 2)

If any thing be omitted in the Declaration, or if more is put in the Declaration than is found by the Jury, if it make a material Variance betwixt the Nar. and the Verdict, the Action shall abate. Variance between the Verdict and the Declaration. (K) (9. 2) 2.

These following are adjudged material variances.

If

(K.9.2) 3.

Words.

If the Declaration be for these Words, Thou procuredst eight or ten of thy Neighbours to perjure themselves, and the Jury find that he said, Thou hast caused eight or ten, &c. for he might be a remote cause, scilicet causa sine qua non, without procurement. Nar. He is a Bankrupt. Verdict. He will be a Bankrupt within two days. Nar. He is a Thief. Ver. He stole a Horse. Nar. Thou art a Murderer. Ver. He is, &c. Nar. I know him to be a Thief. Ver. I think him to be a Thief.

8.
9.
14.
16.

Promise.

(K.9.2) 17.

So it is material Variance, if a special promise be laid to be upon Request, and the Verdict find it without Request. So if the Declaration be upon a Lease made by two, or by Baron and Feme, and the Jury find that one of them had nothing in the Land, or that the Baron only made the Lease, or that the two were Tenants in Common, and so several Leases, otherwise if they were Copartners.

27.

So in Case that the Testator was indebted to the Plaintiff in fifty five pounds, and the Defendant being Administrator in consideratione, &c. promise to pay this, upon non Assumpsit, if the Verdict find the promise to be to pay thirty pounds, part of the fifty five pounds.

Ejectment.

29.

So in Ejectment, if the Nar. be of a Lease of three Acres, a Lease of a Moiety will not maintain the Nar.

Wast.

28.

So in Wast, for cutting Trees, and the Verdict find that he eradicated the Trees, but did not cut them.

A Preſcription in modo decimandi, That every one who hath ſeven Lambs, or under ſeven, ſhall pay to the Parſon ob. for every Lamb, and the Jury find that; and farther, That if he had more than ſeven Lambs, he ſhould pay a Lamb; and that the Parſon ſhould pay the Parſhioner ob. This is not the ſame Preſcription, but makes a variance. Preſcription. 30.

But if there be a Variance between the Verdict and the Nar. either by way of ſurplus or defect; but if this matter of Variance be not material in the extenuation of the Action or Damages, the Action ſhall lye notwithſtanding the Variance. Variance. (K.9.2)

Theſe enſuing are adjudged not to be material.

Nar. Strong Thief. Verdict. Thief. Nar. I ſay, &c. Ver. I affirm, or I doubt not. Nar. The Plaintiff will do ſuch a thing. Ver. I think in my Conſcience he will, &c. Nar. Of a Leaſe by a Parſon for five years; if he tam diu ſhould be Parſon, & tam diu viveret. And the Verdict find the Leaſe to be for five years, if he tam diu viveret without the words, and ſhould continue Parſon; for the Law implyeth, That if he be deprived or reſign, that the Leaſe determines. Nar. He is a Murderer. Ver. He was a Murderer; for when he ſays, He is a Murderer, 'tis not intended, that he did the Act in preſenti, but before. So in Treſpaſſes or Actions upon Torts and wrongs which are ſeveral, If the Verdict find part 'tis no material variance; and the Plaintiff in theſe Caſes ſhall have Judgment. Roll. tit. Tryal 720.

Inquest by default.

A Jury of Middlesex was demanded in the Common-Pleas, the first day of the Term, and some appeared, and some not, so that here was not a full Jury, and neither the Defendant nor his Attorny did appear, and therefore the Plaintiff prayed, that the Inquest might be awarded by default; and by the Opinion of Welsh and Dyer, his prayer shall be granted, and the Custos Brevium, and all the Prothonotaries said the course was so, for the parties are demandable before the Jury, and if the Plaintiff make default, he shall be Nonsuited; and if the Defendant make default, the Jury shall be awarded by default, whether they appear or not. Dyer 265.

What the Defendant loses by his default.

Where an Inquest is taken by default, the Defendant shall lose his Challenges, and by 28 Ass. p. 42. Tit. Enquest in Fitz. he shall lose his Evidences also. Bro. Enquest. 10. quod non est lex.

When the Defendant may be condemned by default, and when an Inquest must be taken upon the default.

Det. The Defendant pleaded a Release, and the Plaintiff replyed non est factum, and at the day of the Venire facias the Defendant made default, and the Inquest was taken upon his default, and found for the Defendant, for which the Plaintiff took nothing by his Bill; and yet if the Plaintiff had prayed it, he might have had the Defendant condemned by his default before the taking of the Verdict, Et sic vide folly in le Plaintiff. Bro. Ib. 5. But upon such Release and default in Trespass, the Inquest shall be taken by default, and the Defendant shall not be condemned by default, though the Plaintiff pray it, and the reason is,

is, because the Debt is certain, and the Damages are incertain in Trespass, Bro. Ib. 3.

And Finch f. 409. hath well collected out of Brook, That always in an Action of Trespass, whatsoever the Issue be, Release, Justification, &c. and also in Debt, Detinue, Account, and the rest which are for things in certainty, if the Issue be taken upon a matter in fait only, as payment, or that an Acquittance pleaded in Bar by the Defendant was made by Dures, &c. The Inquest shall be taken by default, if the Defendant makes default; but in the last recited Actions of Debt, &c. if the Issue be upon the Acquittance it self, Release, or other matter in writing, the Plaintiff may pray Judgment upon the Defendants default, if he will; but if he do not pray it, the Jury shall be taken by default, as in an Action of Trespass.

The Jury may give a Verdict without testimony, or against testimony, when they themselves have conusance of the Fact. Plo. Com. 86. Verdict without, or against testimony.

The Jury are to find Costs and Damages in Debt, Trespass, Ejectment, Nusance, Covenant, &c. Debt for Tythes, treble value of the Tythes, and no Costs nor Damages.

In Audita Querela sur Statute, The Issue and value of the Land.

Waſte, Treble Damages.

Quare Impedit. 1. Whether the Church was void by the death of the Incumbent. 2. Whether it be now full or not? If it be full, at whoſe Preſentation? And if ſix Months be paſt ſince the laſt avoydance, and of what value it is by the year? and what Coſts and Damages?

The Verdict. In Dower, Inquiratur ſi vir obierit ſeizitus de tenementis præd. in dominico ſuo ut de feodo, aut de feodo talliat. Et ſi ita invenierint, tunc quantum tenementa illa valent per annum in omnibus exitibus ultra repriſas, juxta verum valorem eorund. & quantum tempus dilabitur a tempore mortis pred. viri, & quæ dampna petens ſuſtinet tam occaſione detentionis datæ quam premiſſorum.

En Dower Nota. The Jury finding the dying ſeiſed, they muſt aſſeſs Coſt and Damages, but if they find the Husband was ſeiſed, but did not dye ſo, then no Coſts nor Damages, but only the value of the Land.

In Detinue, Si pro quer. de valore rei detent. & cuſtag. & dampna.

In Replevin, Damages for both Parties and Coſts.

In Account, No Damages no Coſts.

In placito terræ. Nulla dampna nec cuſtag. Warrantia Chartæ Conſimile.

Aſſiſe Conſimile.

Prohibition, Si pro quer. tum enquir. de exitibus & non plus.

Partitione facienda, Si pro quer. tunc de exitibus & non plus.

En

En brief de Entry in le per. Cuſtag. & dampna.

In all real Actions generally no more than the Iſſue.

In Replevin, If the Plaintiff be called and do not appear, the Court takes the Verdict for the Defendant, and the Jury aſſeſs Damages and Coſts. But Nota, That a Verdict is not uſually taken in other Actions after the Plaintiff is Non-ſuit. Siderfin 2 part, 155.

Cap. 12.

CAP. XIV.

How the Jury ought to demean themselves, whilst they consider of their Verdict; when they may Eat and Drink, when not; what Misdemeanor of theirs will make the Verdict void: Evidence given them, when they are gone from the Bar spoils their Verdict: For what the Court may Fine them, and where the Justices may carry them in Carts, till they agree of their Verdict. An Amercement Affered by the Jury.

Jurors ought not to eat or drink.

THere is a Maxim, and an old Custom in the Law, That the Jury shall not eat nor drink after they be sworn, till they have given their Verdict, without the Assent and Licence of the Justices; and that is ordained by the Law for eschewing of divers inconveniences that might follow thereupon; and that especially if they should eat or drink at the Costs of the Parties; and therefore if they do so, it may be laid in Arrest of Judgment.

But with the assent of the Justices they may both eat and drink; as if any of the Jurors fall sick before they be agreed of their Verdict, so soon that he may not commune of

of the Verdict, then by the assent of the Justices he may have meat or drink, and also such other things as be necessary for him, and his fellows also at their own costs, or at the indifferent costs of the Parties, if they so agrée, or by the assent of the Justices may both eat or drink: and if the Case so happen, that the Jury can in no wise agree in their Verdict; as if one of the Jurors knoweth in his own Conscience the thing to be false, which the other Jurors affirm to be true, and so he will not agrée with them in giving a false Verdict, and this appeareth to the Justices by examination, the Justices may in such case suffer the Jury to have both meat and drink for a time, to see whether they will agree. And if they will in no wise agree, the Justices may take such order in the matter as shall seem to them by their discretion to stand with reason and conscience, by awarding of a new Inquest, and by setting Fine upon them, that they shall find in default, or otherwise as they shall think best by their discretion; like as they may do if one of the Jury dye before the Verdict, &c. Doct. and Student. 158.

For by assent of the Parties they may eat and drink. Br. Jurors.

New Inquest when the Jury cannot agree.

If the Jury after their Evidence given unto them at the Bar, do at their own charges eat or drink, either before or after they be agreed on their Verdict, it is finable, but it shall not avoid the Verdict; But if before they be agreed on their Verdict, they eat or drink at the charge of the Plaintiff, if the Verdict be given for him, it shall avoid the Verdict, but if it be gi-

Where, if the Jury eat or drink, it shall avoid the Verdict, and where only fineable.

ven for the Defendant, it shall not avoid it; Et sic e converso. But if after they be agreed on their Verdict, they eat or drink at the charge of him for whom they do pass, it shall not avoid the Verdict. 1 Inst. 228.

To give the Jury Mony, makes their Verdict void by two Justices. Leon. 1 part, 18.

What delivered to the Jury after Evidence, shall avoid their Verdict. Littletons Rep. 69. Keeble 1 part, 824.

If the Plaintiff after Evidence given, and the Jury departed from the Bar, or any for him do deliver any Letter from the Plaintiff to any of the Jury, concerning the matter in Issue, or any Evidence, or any Escrowl touching the matter in Issue, which was not given in Evidence, it shall avoid the Verdict, if it be found for the Plaintiff; but not, if it be found for the Defendant, Et sic e converso. But if the Jury carry away any Writing unsealed, which was given in Evidence in open Court, this shall not avoid their Verdict, albeit they should not have carried it with them. Ibid.

How the Jury ought to be kept by the Bayliff.

When they may eat and drink. See *Smiths* Commonwealth. 74.

By the Law of England, a Jury after their Evidence, given upon the Issue, ought to be kept together, in some convenient place, without Meat or Drink, Fire or Candle (which some Books call an Imprisonment) and without speech with any, unless it be the Bayliff, and with him only, if they be agreed. After they be agreed, they may in Causes between party and party, give a Verdict, and if the Court be risen, give a privy Verdict before any of the Judges of the Court, and then they may

may eat and drink, and the next morning in open Court, they may either affirm, or alter their privy Verdict, and that which is given in Court shall stand. But in Criminal Cases of Life or Member, the Jury can give no privy Verdict, but they must give it openly in Court. Where there can be no privy Verdict.

A privy Verdict may be taken in a Quo Warranto, Perjury, or wherever the King is party, unless in case of life and death. Keebles 3 part, 459.

Neither can a Jury sworn and charged in case of Life or Member, be discharged by the Court, or any other, but they ought to give a Verdict. And the King cannot be Non-suit, for he is in Judgment of Law ever present in Court; but a common person may be Non-suit. And in civil Actions the Justices upon cause may discharge the Jury. Br. Enquest. 68. 47. 39. &c. Where the Jury cannot be discharged before Verdict. The King cannot be Non-suit.

In an Information by an Informer, qui tam, &c. the Informer may be Non-suited, 1 Inst. 139. Cokes Entries, Tit. Information, 394.

But this is against common practice; and I have known, that after a Jury of Life and Death have been sworn, and charged with Prisoners Arraigned, the Judge having been credibly informed, That it was a Jury pack't to favour some Prisoner, has discharged that Jury, and made the Sheriff return another presently. Information.

In Hillary Term, Sexto H. 8. Rotul 358. It was alledged in arrest of the Verdict at the Nisi prius, That the Jurors had eat and drunk. And upon examination it was found,

that they had first agreed, and that returning to give their Verdict, they saw Rede Chief Justice in the way going to see a Fray, and they followed him, Et in veniendo viderunt cyplum & inde biberunt. And for this every one of them was fined 40 d. And the Plaintiff had Judgment upon the Verdict. Dyer 37.

Jurors fined.

And Dyer 218. At the Nisi prius, the Jury after their charge given, returned and said, That they were all agreed except one, who had eat a Pear, and drunk a draught of Ale, for which he would not agree; and at the request of the Plaintiff, the Jury was sent back again, and found the Issue for the Plaintiff. And the matter aforesaid being examined by the Oath of the Jurors Separatim, and the Bayliff who kept them, and found true, the Offender was committed, and afterwards found Surety for his Fine, Si, &c. And Fitzherbert, the then Justice of Assise, gave him day in Banco, &c. At which day a Fine of twenty shillings was there assessed. Et quoad Ball. Curia advisare vult.

Jurors at the *Nisi prius*, fined in Bank, for eating Pears and drinking Ale.

In Trespass by Mounson against West, the Jury was charged, and Evidence given, and the Jurors being retired into a House for to consider of their Evidence, they remained there a long time without concluding any thing, and the Officers of the Court who attended them, seeing their delay, searched the Jurors, if they had any thing about them to eat; upon which search it was found that some of them had Figgs, and others Pippins, for which the next day the matter was moved

Fined for having Figgs and Pippins about them.

moved to the Court, and the Jurors were examined upon Oath, and two of them did confess, that they had eaten Figs before they had agreed of their Verdict; and three other of them confessed, that they had Pippins but did not eat of them, and that they did it without the knowledge or will of any of the parties. And afterwards the Court set a Fine of 5 l. upon each of them which had eaten, and upon the others which had not eaten 40 s. But upon great advice and consideration had, and conference with the rest of the Judges, the Verdict was held to be good, notwithstanding the said misdemeanor. Leon. 1 part, 133.

And see the Book of Entries, 251. The Jurors after they went from the Bar, ad seipsos, of their Verdict to advise, Comederunt quasdam species, scil. Raisons, Dates, &c. at their own Costs, as well before as after they were agreed of their Verdict. And the Jurors were committed to Prison, but their Verdict was good, although the Verdict was given against the King.

Fined for eating Raisins and Dates.

In Ejectione firmæ, it was found for the Defendant, three of the Jurors had Sweetmeats in their Pockets, and those three were for the Plaintiff, until they were searched and the Sweet-meats found, and then did agree with the other nine, and gave Verdict for the Defendant. It was the Opinion of the Justices, That whether they eat or not, they were finable for having of the Sweat-meats with them, for that is a very great misdemeanor. Godbolt 353.

Finable for having sweetmeats, &c. about them, though they do not eat them. See *Plo. Com.* 519. One fined and imprisoned for having *Sugar-Candy* and *Liquorish* about him.

40 As-

Jurors Carted.

40 Assise. Placito 11. The Justices said, That if the Jurors will not agree in their Verdict, the Justices may carry them in a Cart along with them, till they are agreed.

The same Evidence given to the Jury, after they were gone from the Bar, spoils the Verdict.

The Jury were gone from the Bar, to confer of their Verdict, and one of the Witnesses before sworn on the Defendants part, was called by the Jurors, and he recited again his Evidence to them, and after they gave their Verdict for the Defendant. And complaint being made to the Judge of the Assises of this misdemeanor, he examined the Inquest, who confessed all the matter, and that the Evidence was the same in effect, that was given before, Et non alia nec diversa. And this matter being returned by the Postea, the Opinion of the Court was, That the Verdict was not good, and a Venire facias de novo was awarded. Cro. last part, 189.

Trinity Term 1653. between Wells and Tayler, Copies of a Bill, Answer and Depositions were proved, but not all read and delivered to the Jury, who carried them with them from the Bar in a bundle, which they laid by them and did not look on; yet their Verdict at the Bar, was set aside for this cause, and the Court would not regard their saying, that they did not read them, for they might say that to save themselves; it being a fault to take any thing without the Courts knowledge.

If the Names of the Jurors be transposed in the Pannel of the Hab. Corp. As those which were first in the Pannel of the Venire fac. be set last in the Hab. Corp. 'tis good cause for a new Tryal. So held in the Exchequer, 1694.

If the Venire be returned but not filed, the Pannel may be changed, but by Windham, not reasonable the Jury returned should be changed without motion. Keeble 1 Vol. 562.

If one of the Parties say to the Jury after they are gone from the Bar, You are weak Men, it is as clear of my side as the Nose in a Man's Face. This is new Evidence, for his affirmation may much perswade the Jury, and therefore shall quash the Verdict. If a Party speak to them.

So if any of the Parties Servant speak to the Jury, and the Verdict goes for his Master, it may be quashed, but if for the other side, 'tis only fineable. Keeble 300. 1 part.

So if any thing be read to them, which they ought not to have with them, as a Book of Depositions, some whereof were read in Evidence. Prat's Case, 21 Jac.

The Plaintiff delivered an Escrowl to a Juror impannelled, before he was sworn, who afterwards being sworn, and gone with the Jury from the Bar, to consider of the Verdict, shewed the same Escrowl to his Companions, who found for the Plaintiff. The Minister who kept the Enquest, informed the Court hereof, and the Jury being examined, confessed the matter aforesaid, Escrowl delivered to a Juror before he was sworn, vitiates the Verdict.

ſaid, upon which Judgment was ſtayed; for after the Jury are ſworn, they ought not to ſee nor carry with them any other Evidence but what was delivered to them by the Court: afterwards the Plaintiff ſaid, That the Eſcrowl proved the ſame Evidence which was given to them at Bar by him; wherefore it was not ſo bad, as if it had been new Evidence not given before: Sed non allocatur. 11 H. 4. 17.

Church-Book delivered to the Jury, act of Court.

Paſche 38 Eliz. Inter. Vicary and Farthing, at the Niſi prius. The Iſſue was about Non-Age, and two Church-Books were given in Evidence, one whereof was delivered to the Jury in Court, by the aſſent of Parties, and afterwards the other was delivered to the Jury out of the Court, by the Solicitor of the Plaintiff, without the aſſent of the Court, and a Verdict for the Plaintiff, and this was indorſed on the Poſtea; The Queſtion was, whether this ſhould make the Verdict void or no, for the Juſtices differed in Opinion, Popham and Gawdy, that it ſhould not; Fenner and Clench, that it ſhould; the Negative Juſtices gave theſe Reaſons; That the Book was delivered in Evidence in the Court, and ſo the other Party might anſwer to it, and that the Court had informed the Jury of the validity thereof, how far they were to believe it, with many other Reaſons: but the affirmative was urged, becauſe there might be ſome matter in this Book, to induce them otherwiſe than was intended before, and becauſe it was delivered on his part, for whom the Verdict paſſed, without the Courts aſſent;

sent; yet one Book (scil. Cro. last part 411.) tells us, Judgment was afterwards given for the Plaintiff. See More's Reports 452. The Books differ, for Cro. makes Clinch give his Opinion for the Verdict. But More brings him on the other side, which I conceive is truest; and for my part, I know no reason why foisting of Evidence to the Jury, without the Court, should have any favour at all.

In the Case of Taylor and Web, Trin. 1653. B. R. Twisden moved to set aside a Verdict given at Bar, because that after Evidence when the Writings were delivered to the Jury, some Writings which were not sealed (and therefore ought not to be delivered to the Jury) were delivered by a Stranger to the Jury. Consider the Reasons in the former cases.

Hales Counsel of the other side, produces an Affidavit of the Foremans of the Jury, that they made no use of them in giving their Verdict, and that most of those Writings were read in Court in Evidence upon the Tryal, and Hales said, That if this should avoid the Verdict, then that would be in the power of any Stranger unknown, and against the mind of the Parties to avoid any Verdict.

Rolls Chief Justice. The Affidavit of the Jury ought not to be allowed to make good their own Verdict, for now they are (as it were) Parties, and have offended, and shall not be allowed by their own Oath to take off their Offence, and it is the Duty of the Jury to look what Writings they receive before they go from the Bar; and

if

if any such Paper be wrap'd up among other Papers delivered to them by the Court, so soon as they have discovered it, they should call in the Tip-staff, who keeps them, and deliver it to him, and to testifie they made no use of it, and he said it would be dangerous to give the least way to the delivering of any Writings to a Jury.

And at another day Rolls cited 11 H. 4. 18. the Plaintiff (before the Tryal) delivered a Breviate of his Evidence to the Jury, which contained no more than was proved in Court, yet by this the Verdict was avoided; So Mich. 31 Eliz. C. B. Metcalf and Dean, After the Jury were gone from the Bar, they sent for one of the Witnesses and re-examined him, who gave the very same Evidence that he had before given in Court, yet the Verdict was avoided; and the reason of both is, a fear and jealousie that other matters might be given, &c.

37 Eliz. Farthings Case, a Paper not under Seal, which was given in Evidence, was delivered to the Jury, this did not avoid the Verdict because here can be no such fear; and per Roll, If any Writing (though not given in Evidence) be delivered to the Jury by the Court, it shall not avoid the Verdict. And in the principal Case the Verdict was avoided.

Escrowl from one who was no party.

Hill. 40 Eliz. Rot. 847. In Arrest of Judgment after Verdict, it was alledged, that a Juror delivered to his companions, an Escrowl for Evidence to them, which was not given in Evidence at the Tryal, and adjudged no cause to Arrest Judgment, unless

unless it had been received from one of the Parties, which did not appear. More 546. but otherwise if it had been given by a party, and the Jury had found for him.

In the Case of Duke and Ventres, Mich. 1656. B. R. tryed at Bar, one Mr. Beverly of Suffolk a Barrister was returned of the Jury, who (having been at a Tryal of the same Cause above twenty years before, in the Exchequer, and heard there great Evidence to make a Deed fraudulent, which was now the contest) demanded of the Court, whether he ought to inform the rest of the Jury privately of this, or conceal it, or declare it in open Court? The Court ordered him to come into Court, and deliver all his knowledge which he heard then proved (which Evidence was not now given, because the parties were dead) and so he did being not sworn again, but only upon the Oath taken as a Jury-man.

And certainly, it is of dangerous consequence, to receive a Verdict against Evidence given, on supposal that some of the Jury knew otherwise, or on private Information given by one Jury-man to the rest, where he can't be cross-examin'd; and let such Jurors beware of Attaint, but the best way is (as before) in open Court.

In a Writ of Error, the first Error assigned was, That Termino Trin. twelve Jurors, and no more, did appear. This ex assensu partium, was adjourned until Crastino Animar. on which day, two others came in and were sworn, being of the first Pannel. Jury adjourned.

The

The Court all clear of Opinion, That this is no Error, this being good enough, they being all to be called again. Leon. 3. part, 38.

Juror depart. If a Juror depart after he is ſworn, he ſhall be Fined and Impriſoned, and by aſſent of Parties, another Juror may be ſworn. Bro. Jurors 46. Lib. 5. 40.

If a Man be non-ſuited after the Jury is ready to give their Verdict, the Court may cauſe the Amercement of the Plaintiff to be preſently aſſered by the Jurors. Lib. 8. 39.

If a Jury give their Verdict by Lot, 'tis a Miſdemeanor and cauſe of a new Tryal, although in Prior and Powel's Caſe, Keeble 1 Vol. 811. A new Tryal was denyed, becauſe the Lot ſeemed there very innocent.

But ſee Keebles 3 part, 805. A Jury, on Affidavit, that they gave their Verdict on throwing croſs and pile, were bound to appear to an Information, which 'tis ſaid broke one of the Jurors Heart. Keeble 1 part, 811.

The King againſt Marchant. Keeble 2 part, 404, 404.

Upon a motion for a new Tryal on the Judges Certificate that the Verdict was againſt Evidence in Perjury. The Court ſaid there could be no new Tryal, for or againſt the King, and denyed it, but ſaid the Certificate might mitigate the Fine.

Nota, The Court will not award new Tryals on the Jurors gain-ſaying their Verdicts, unleſs the Judge before whom it was tryed, conceived the Verdict to be given again Evidence. per Cur. 13 Car. 2. B. 5.

The

The Jury appearing and ſworn in an Information of Extorſion, The Court would not diſcharge the Jury upon a Ceſſat proceſſus, ſo the Attorny General cauſed the Clerk of the Crown to enter a Noli proſequi.

CAP. XV.

What Puniſhment the Law hath provided for Jurors offending; as taking Reward to give their Verdict. Of *Embraceors*. *Decies tantum*. Attaint. Several Fines on Jurors. What Iſſues they forfeit, and of Judgment for ſtriking a Juror in *Weſtminſter*, &c.

YOU have already heard how the Court may Fine the Jurors for their miſdemeanors in giving up their Verdict, I will proceed in ſhewing what puniſhments they are lyable unto, if they neglect their duty; and doubtleſs no Men have more need of knowing what Penalties the Law inflicts on their Offences, than common Jurors, who too often being pre-ingaged with favour to the Plaintiff, or malice againſt the Defendant, Et ſic e converſo; or with common Intereſt (as they call it) where Tythes or Commons are in queſtion, will neither

hearken to their Evidence, nor direction of the Judge, but subvert the whole drift of the Common Law, which will have them of the Neighbour-hood where the Fact was committed, to the end that they knowing most of the Fact, may consequently give the best Verdict; yet contrariwise, Jurors which live nearest, do now a days most commonly so fetter themselves with favour or animosities to the Parties; that those which live farthest off (as Juries from other Counties) for the most part give the clearest Verdicts. And how should the Judges remedy this mischief, but by severely punishing those Juries which offend? the Law in this will be their guide, for without doubt (excepting Life and Member) the Law hath provided more severe punishments against Juries, than against any other Offenders whatsoever, as well knowing that corruptio optimi est pessima: And common Jurors generally have nothing to do with this verse, Oderunt peccare boni, virtutis amore, Therefore 'tis fit they should be concerned in the next, Oderunt peccare mali, formidine pœnæ; wherefore the description of what this pœna is, shall be the conclusion of this Treatise.

The Penalty of Jurors taking Rewards.

If any Juror take a Reward to give his Verdict, and be thereof attainted, at the Suit of other than the party, and maketh fine, he which sueth shall have half the fine, and if any of the parties to the Plea, bring his Action against such Juror, he shall recover his damages. And the Juror so attainted shall have Imprisonment for one Year, which Im-

Imprisonment shall not be pardoned for any fine: This is by the Statute of 34 E. 3. Cap. 8.

5 E. 3. Cap. 10. It is accorded, That if any Juror in Assises, Juries or Enquests, take of the one party, or of the other, and be thereof duly attainted, That hereafter he shall not be put into any Assises, Juries, or Enquests; and nevertheless he shall be commanded to Prison, and further ransomed at the Kings will. And the Justices before whom such Assises, Juries and Enquests, shall pass, shall have power to enquire and determine according to this Statute.

Shall not serve of any other Inquest.

Imprisoned and ransomed, (that is) fined.

A Man would think that these Statutes should have frighted any Juror from taking Rewards to give his Verdict. But

------Quid non mortalia pectora cogis
Auri sacra fames?

So sacred is this love of Mony, that Conscience her self must vail to it, and not stand in competition with such allurements: wherefore the Law did redouble its force; nay more, produced a Decies tantum, scil. That a Juror taking Reward to give his Verdict, shall pay ten times as much as he hath taken; which forfeiture, methinks, should make even those who love Mony best, refuse to take Mony upon such an account, because it is like a Canker in their Estates, depriving them in the end, of ten times more than it brought; for which, hear the Statute 38 E. 3. Cap. 12.

Decies tantum.

Item, As to the Article of Jurors, in the 24th year, it is assented and joyned to the same, That if any Jurors in Assises sworn, and other Inquests to be taken between the King and party, or party and party, do any thing take by them or other of the party, Plaintiff or Defendant, to give their Verdict, and thereof be attainted by Process contained in the same Article, be it at the Suit of the party that will sue for himself, or for the King, or any other person, every of the said Jurors shall pay ten times as much as he hath taken: and he that will sue shall have the one half, and the King the other half; and that all Embraceors, that bring or procure such Inquests in the Country, to take gain or profit, shall be punished in the same manner and form as the Jurors. And if the Juror or Embraceor so attainted, have not whereof to make agrée, in the manner aforesaid, he shall have the Imprisonment of one Year. And the intent of the King, of Great Men, and of the Commons is, That no Justice or other Minister, shall enquire of Office, upon any of the points of this Article, but only at the Suit of the party, or of other, as afore is said.

Embraceor.

Upon which Statute there is a Writ called a Decies tantum; and who will may bring it, for it is a popular Action, and lyes (as you see) where any of the Jurors, after he is sworn, taketh of one party or of the other, or of both (and then he is called an Ambidexter) any Reward to give his Verdict, &c. And it may be brought against all the Jurors and

Ambidexter.

and Embraceors, although they take several Sums of Mony, and although the Jury give no Verdict, or a true Verdict. But it doth not lye against an Embraceor, if he taketh no Mony, and imbraces, or taketh Mony, and doth not imbrace. See Bro. Tit. Decies tantum 13. and F. N. Br. 171.

So F. N. Br. saith, but for my part, I think he is mistaken, for the Statute mentioneth nothing of his taking Mony; and in my opinion, the case of 37 H. 6. 13. is full against him.

An Embraceor is he that procures the Jurors in the Country, to take gain or profit, or comes to the Bar with the party, and speaks in the matter, or stands there to survey the Jury, &c. or to put them in fear, or solicits them to find on the one side or other, and this fellow cloaks his Embracery, under pretence of labouring the Jurors to appear, and to do their Conscience: And thus the Attornies in the Country, often take upon them to do, and many times put in a word or two for their Clyents; which practice deserves the most severe punishment, next to their getting of the Sheriff to return such and such in the Jury, which they, having bæn under-Sheriffs themselves, and so agrée with one another, are most expert at.

Embraceor.

Attornies ill practice.

But it was said by Rolls Chief Justice, That a Plaintiff might well intreat one Juror to appear, and that it was allowed in the Star-Chamber, but a Stranger could not labour one Juror to appear.

But Counsellors at Law may plead for their Mony at the Bar, but they must not labour the Jury privately; and if they take Mony for this, they are Embraceors. F. N. 6. Br. 171.

Counsellors.

Fined for taking Mony after their Verdict.

So much doth the Law hate that Jurors should privately take Mony for their Verdict, That certain Jurors were fined, for taking Mony after their Verdict, though there was no pre-ingagement for it. 39 Assise. p. 19.

The practice is otherwise at this day; if it were not, the Middlesex Juries would so court the Bayliffs to return them, especially to Tryals at Bar, where five pounds a Man is frequent Gratuity, sometimes more.

Issues.

If a full Jury appear, and some are challenged off, so that the Jury remains for default of Jurors, the Defaulters shall lose their Issues. 4 H. 6. 7. Otherwise if a Jury be sworn, and one is withdrawn by consent.

But if there be a joynder of Counties, and a Jury of one County appear, and not of the other; The Defaulters of that County from which enough came, shall not lose their Issues, because the Inquest doth not remain for their default, but for the default of them of the other County. 48 Ass. 5. Mer quære.

Amercement.

If the Jurors at the return of the Scire facias make default, yet they shall not be amerced, because the parties may be claimed at the first day, but at the return of the Habeas Corpora they shall. 10 E. 4. 19. 1 E. 3. 12.

Demand sur peine.

If any of the Jurors appear, the Court may charge them to inquire if any of the other Jurors were within the Town after the return; and if they find they were, they shall

ſhall be demanded upon a Pein, and if they come not, they ſhall be amerced. Rolls Tit. Tryal 632.

A Juror was challenged, and ſix other Jurors were ſworn to try the Challenge, who found him indifferent, and thereupon the Jury was demanded, but did not appear; for which default he was fined the value of his Lands for a year; and the other Jurors inquired of the value, &c. although the other party then would have challenged him when he was demanded, ſo that he might have bèn treit, but the Court would not admit this, becauſe then the King would have loſt his Fine. 36 H. 6. 27. Juror fined for departing when he was challenged.

If a Juror appear, and is adjourned upon pain, and makes default, in this Caſe, becauſe he ſhall be fined to the value of his Land per annum, this ſhall be inquired by his Companions of the Jury, becauſe the Court knows not the ſvalue of his Land. Lib. 8. 41. Juror adjourned upon pain.

A Verdict was taken from the Fore-man of the Jury, to which one of them did not aſſent, and Damages aſſeſſed to twenty ſhillings, in Treſpaſs and Aſſault; and afterwards, every one of the eleven were fined, for giving their Verdict before they were all agreed. 40 Aſſiſe 10. Fined for giving a Verdict before they were agreed.

Where a Jury are to be fined, a fine joyntly impoſed on them, is not legal, but they muſt be ſeverally fined, becauſe the Offence of one, is not the Offence of another. Et nemo debet puniri pro alieni delicto. For then it might be ſaid, Rutilius fecit, Æmilius plectitur. Lib. 11. 42. The Fine muſt not be joynt.

Punishment for striking a Juror.

A Man struck a Juror at Westminster (sitting in the Court) who passed against him, and he was thereof Indicted and Arraigned at the Kings Suit, and attainted, his Judgment was, That he should go to the Tower, and stay there in Prison all days of his Life, and that his right Hand should be cut off, and his Lands seised into the Kings Hands, 41 Assise, p. 25. And now our Juror sees what punishment it is to strike him in the face of the Court, let him hold his Hands from others, lest the same Judgment light on him.

Issues.

By the Statute of 27 Eliz. Cap. 6. It is Enacted, That upon every first Writ of Habeas Corpora or Distringas, with a Nisi prius, Ten Shillings shall be returned in Issues, upon every person impannelled, and upon the second Writ, twenty shillings, and upon the third thirty shillings. And upon every Writ that shall be farther awarded to try any Issue, to double the Issues last, afore specified, until a full Jury be sworn.

Not summoned.

And these Issues being returned upon a Tenement in Fee-simple, in Tayl or for Life, of another, or of himself, or in the right of his Wife; the Land he then hath will be chargable for it, and any Mans Cattel upon this Land may be distrained for it.

But if the Under-Sheriff, &c. return a Juror summoned, who in truth was not legally summoned, and therefore doth not appear, and so loseth Issues, the Under-Sheriff shall pay him double the value of the Issues

Issues lost. See the Statutes of 35 H. 8. 6. and the 2 E. 6. 32.

And Note, The Law hath been so careful to punish all Offenders, who would endeavour to byals and corrupt the Jury; and to punish the Juries themselves, if they receive Mony to give their Verdict, or any otherwise pre-ingage themselves to any of the parties, all which is to the end that a true and honest Verdict may be given: What punishment shall that Jury have which gives a false Verdict?

Such a punishment, that (as I said before) in civil Causes it is without Example: and surely, if the Jurors did bear it in their minds, their Verdicts would be always grounded upon their Evidence; and not upon their own Interest, or any partiality to either of the parties.

Wherefore if the Jurors give a false Verdict (which is Perjury of the highest degree) upon an Issue joyned betwæn the parties in any Court of Record, and Judgment thereupon, The party grieved may bring his Writ of Attaint, in the Kings-Bench, or Common-Pleas; upon which 24 of the best Men in the County are to be Jurors, who are to hear the same Evidence which was given to the Petit Jury, and as much as can be brought in affirmance of the Verdict, but no other against it. And if these 24 (who are called the Grand Jury) find it a false Verdict; then followeth this terrible and heavy Judgment, at Common-Law, upon the Petit Jury. Attaint.

1. That

Judgment in Attaint.

1. That they ſhall loſe Liberam Legem for ever, that is, they ſhall be ſo infamous, as they ſhall never be received to be a Witneſs, or of any Jury.

2. That they ſhall forfeit all their Goods and Chattels.

3. That their Lands and Tenements ſhall be taken into the King's Hands.

4. That their Wives and Children ſhall be thrown out of doors.

5. That their Houſes ſhall be raſed and thrown down.

6. That their Trees ſhall be rooted up.

7. That their Meadow Grounds ſhall be ploughed up.

8. That their Bodies ſhall be caſt into the Goal, and the Party ſhall be reſtored to all that he loſt, by reaſon of the unjuſt Verdict. So odious is Perjury in this Caſe, in the Eye of the Common-Law; and the ſeverity of this puniſhment is to this end, Ut pœna ad paucos, metus ad omnes perveniat; for there is Miſericordia puniens, and there is Crudelitas parcens. And ſeeing all Tryals of real, perſonal, and mixt Actions depend upon the Oath of twelve Men, prudent Antiquity inflicted this ſevere puniſhment upon them, if they were attainted of Perjury. 1 Inſt. 294.

But now by the Statute of 23 H. 8. Cap. 3. The ſeverity of this puniſhment is moderated, if the Writ of Attaint be grounded upon that Statute.

But

But the Party grieved, may at his Election, either bring his Writ of Attaint, at the Common-Law, or upon that Statute, wherefore let the Juror expect the greatest punishment, when he offends. 3 Inst. 163. 222.

And so I conclude as to the Jurors, only with the Words of Forteſcue, Quis tunc (etſi immemor ſalutis animæ ſuæ fuerit) non formidine tantæ pœnæ, & verecundia tantæ infamiæ, veritatem non diceret ſic Juratus?

Who then, though he regard not his Souls health, yet for fear of ſo great punishment, and for ſhame of ſo great Infamy, would not upon his Oath, declare the truth?

But as to our Practicer, I would give this one farther Advertiſement, which relates alſo to Jurors.

When a Verdict has been given by a former Jury in the ſame Cauſe, and on the ſame Evidence, it is allowed to give the former Verdict in Evidence, and I have known this introduced by the Counſel, as obliging to the latter Jury, to find accordingly; intimating, that otherwiſe they do (in effect) perjure the former twelve Men, which may amuſe tender minds, and draw them from the ſtrict inquiry into the Merits of the Cauſe, in favour of their Predeceſſors, which is a palpable miſtake and miſinformation, for theſe Reaſons.

1. The ſame Evidence in the former Cauſe and Tryal (perhaps) was not ſo perſpicuouſly delivered as in this.

2. This

2. This latter Jury may be of more sagacious and comprehensive Judgment than the former.

3. The Directions of the Court (which the Jury most heed) may be more clearly delivered to this Jury.

4. The matter in Contest (perhaps) was not in the former Tryal so clearly manag'd by the Counsel, being not so well instructed as afterwards.

5. And Lastly, supposing the Evidence equally delivered by the Witnesses, apprehended by the Jury, directed by the Court, manag'd by the Counsel, yet its no Perjury or Fault to differ in Judgment; for if twenty four Jury-Men were to try a matter of Fact, and twelve were of one Opinion, and twelve of another, who is in Fault? while they Judge according to the best of their Knowledge and Skill, to which (only) they are sworn. And it's a reasonable kindness to Jury-Men, to make good Construction of differing judgments among them, while we see how oft Judges themselves differ in their Opinions, on a matter stated equally to them all, and that (not only as to matter of Law, but) as to matter of Fact, as attending Practicers may observe in Tryals at Bar, in the several Judges several Directions. And this I thought good to Advertise, for that I have known Verdicts gained on this unwarrantable Suggestion, against clear and express Evidence, and could instance some Cases. Sed verbum sat, &c.

As to the difference betwixt the Judge and the Jury, and that Question which has made such

such a noise, Viz. Whether a Jury is finable for going against their Evidence in Court, or the Direction of the Judge? I lwk upon that Question as dead and buried, since Bushel's Case, in my Lord Vaughan's Reports; yet some of the Ashes thereof I may sprinkle here witout Offence. It doth appear there to have bæn resolved by all the Judges, upon a full Conference at Serjeants-Inn, That a Jury is not finable for going against their Evidence, where an Attaint lies. And that it is evident by several Resolutions of all the Judges, That where an Attaint lyes, the Judge cannot Fine the Jury, for going against their Evidence or Direction of the Court, without other Misdemeanour.

And where an Attaint doth not lye, as in Criminal Causes upon Indictments, &c. My Lord Vaughan says these Words, That the Court could not Fine a Jury at the Common Law, where Attaint did not lye; I think to be the cleareſt Position that ever I considered either for Authoritty or Reason of Law. And one Reason for this (which can never be answered) is, The Judge cannot fully know upon what Evidence the Jury give their Verdict; for they may have other Evidence than what is shewed in Court. They are of the Vicinage, the Judge is a Stranger, they may have Evidence from their own personal knowledge, that the Witnesses speak false, which the Judge knows not of; they may know the Witnesses to be stigmatised and infamous, which may be unknown to the Parties or Court.

And

And if the Jury knew no more than what they heard in Court, and so the Judge knew so much as they, yet they might make different Conclusions, as oftentimes two Judges do; and therefore, as it would be a strange and absurd thing to punish one Judge for differing with another in Opinion or Judgment; so it would be worse for the Jury, who are Judges of the Fact, to be punished for finding against the direction of him who is not Judge of the Fact. But he that would be better satisfied in this point, may read that Case, and the Authorities and Reasons given by my Lord Vaughan, whom I must honour, as a Man of great Reason.

It is shewed in that Case, That much of the Office of Jurors, in order to their Verdict, is Ministerial, as not withdrawing from their Fellows after they are sworn; not receiving from either side Evidence after their Oath, not given in Court; not eating and drinking before their Verdict; refusing to give a Verdict, and the like; wherein if they transgress, they are finable: But the Verdict it self when given, is not an Act Ministerial but Judicial, and according to the best of their judgment; for which they are not finable, nor to be punisht but by Attaint.

Nor can any Man shew, that a Jury was ever punisht upon an Information, either in Law or the Star-Chamber, where the Charge was only, for finding against their Evidence, or giving an untrue Verdict, unless Imbracery, Subornation, or the like, were joyned.

But

But the Fining and Impriſoning of Jurors for giving their Verdicts, hath ſeveral times bẽn declared in Parliament an Illegal and Arbitrary Innovation, and of dangerous conſequence to the Government; the Lives and Liberties of the People. This celebrated Tryal by Juries having bẽn confirmed by many Parliaments.

Keeble 2 part, 180. 1 part, 169.

Littleton, Sect. 368. tells us, That as the Jury may find the matter at large, that is a Special Verdict, (which the Court cannot refuſe, if it be pertinent to the matter put in Iſſue) and leave the Law to the Court, ſo if the Jury will, they may take upon them the knowledge of the Law upon the matter, and may give their Verdict generally, as is put in their Charge. As for Example, upon all General Iſſues; as Not Guilty, pleaded in Treſpaſs, Nil debet in Debt, Nul tort, Nul diſſeiſin in Aſſiſe. Ne diſturba pas in Quare Impedit, &c. Though it be matter of Law, whether the Defendant be a Treſpaſſer, a Debtor, Diſſeiſor, or Diſturber, in the particular Caſes in Iſſue; yet the Jury find not (as in a Special Verdict) the Fact of every Caſe by it ſelf, leaving the Law to the Court, but find for the Plaintiff or Defendant, upon the Iſſue to be tryed, wherein they reſolve both the Law and the Fact complicately, and not the Fact by it ſelf. And ſo upon Not Guilty to an Indictment of Felony, breach of the Peace, Treſpaſs, &c. and other Caſes where the Law and the Fact are complicate and joyned, they may determine upon both: Yet I muſt give them my Lord Coke's Caution, which is, That although the Jury, if they

Hardres Rep. 409.

they will, may take upon them the knowledge of the Law, and give a general Verdict, yet it is dangerous for them so to do; for if they do mistake the Law, they run into the danger of an Attaint. Therefore to find the matter specially, is the safest way where the Case is doubtful.

And to end, as I began, That Decantatum in our Books (as my Lord Vaughan calls it) Ad quæstionem facti non respondent Judices, ad quæstionem legis non respondent Juratores, literally taken is true; for if it be demanded what is the Fact? the Judge cannot answer it. If it be asked, what is the Law in the Case? the Jury cannot answer it. But upon the general Issue, if the Jury be asked the Question, Guilty or not? which includes the Law, they resolve both Law and Fact, in answering Guilty or Not Guilty. So as though they answer not singly to the Question what is the Law? yet they determine the Law in all matters where Issue is joyned and tryed, but where the Verdict is special. But in such Cases the Judge cannot of himself answer or determine one Particle of the Fact, but must leave it to the Jury, with whom let it rest and continue for ever, as the best kind of Tryal in the World for finding out the Truth; and the greatest safety of the just Prerogatives of the Crown, and the just Liberties of the Subject; and he which desireth more for either of them, is an Enemy to both.

FINIS.

PRECEDENTS

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TO THE

ARRAY, &c.

AND THE

PROCEEDINGS thereupon.

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A Form of Challenge to the Array.

ET nunc ad hunc diem ſcilt, &c. venit pred' A. Quer' & B. Defend' p attornat' ſuos, & Juratores fuer' Impanellat' & demand' & venerunt, & inde pred' B. Calumniavit Arraiam' panneli' pred' quia, &c.

This muſt be read by the Councel in French, and delivered to the Clerk to read it in Latin.

A Challenge to the Array, becauſe the Sheriff is Couſin, &c.

Et ſup hoc idem Henricus Vernon calumpniat Arraiamentū pannelli p̄dict' quia dic quod pannellū illud arriat fuit p quendam Johannem Zouch Milit̄ jam & t̄ēe Arraiament p̄ed fact' vic' p̄ed Com' Derb' qui quidem vic' eſt conſanguineus p̄ed Johannis Maners viz. filij Georgij Zouch Ar̄ filij Johannis Zouch Mil̄ fil̄ Johannis Zouch Ar̄ filij Johannis Zouch Ar̄ filij Willielmi Domini Zouch filij Alan Domini Zouch filij Willielmi Domini Zouch filij Elizabethe filie Willielmi Domini Roos Patris Willielmi Domini Roos Patris Thome Domini Roos Patris Elianore Patris Georgij Maners Militis Patris Thome Comitis Rutland Patris p̄ed Johannis Maners Et hoc paratus eſt verificare unde petit Judicium ac quod pannellum p̄ed caſſetur, &c. que quidem calumn̄ p̄ed Tho. Stanley dedic' p N. Sturley de Beachiff Ar̄ & R. F. de T. Ar̄ triatores ad hoc electos & juratos compta eſt ſa Ideo pannellum p̄ed caſſetur, & amoveattur, &c. Cokes Entries, 340.

A Challenge becauſe the Sheriff is Tenant, &c.

Et ſup hoc idem Johannes Dom̄ St. John dic' q̄d J. D. Ar̄ vic' Com' p̄d jam exiſtit quodque idem J. D. tenet duodecim acras p̄rati cum p̄tin̄ in Budenham in Com' p̄ed de ipſo Johanne Domino St. John ad voluntatem p reddit 40 s. eidem Johanni Domino St. John an-

annuatim ſolvend Et ea de cauſa petit br̃e Domine Regine de ve. fac' hic riſcem, &c. ad triandum exitum p̃d ſuperius junct Coronatoribus ejuſdem Domine Regine in Com̃ p̃ed dirigend, &c. Sup quo p̃ed Tho. dic̃ q̃d p̃ed Jo. D. non tenet p̃ed riſ acras p̃rati cum p̃tin nec aliquam inde parcell de p̃fat J. Domino St. John ad voluntat̃ put idem Johannes Dominus St. John ſuperius allegavit Ideo non obſtante Calumpnia p̃ed Jo. Domini St. John ad p̃efat̃ vic̃ Preceptū eſt eidem vic̃ q̃d ve. fac. hic, &c. Cokes Entries 397.

A Preſident of a Challenge for default of Hundredors which hath been ſeveral times made uſe of at the Aſſiſe.

Et ſup hoc p̃ed A. B. p C. D. Attorn ſuum ven & Calumpn Arraiament̃ pannell̃ p̃ed quia dic̃ quod villa de Dale in Com̃ p̃ed in qua quidem villa cauſa Actionis oritur & in narratione p̃ed quer̃ locat̃ & oritur ſuppon eſt & Tempore Arraiamenti pannelli illius fuit & adhuc exiſtit infra hundred de Downs in Com̃ p̃ed quodq; modo vic̃ Com̃ p̃ed non Retorn ſeu impannellavit aliquos hundredores de hundred de Downs p̃ed ad triand exit̃ int̃ partes p̃ed modo junct̃ nec Jur̃ modo Impannellat̃ & retorn habent ſeu aliquis eorundem Jur̃ habuit vel modo habet aliquas t̃as ſeu tenementa infra hundred de Downs p̃ed nec habent habuer̃ ſeu aliquis eorundem Jur̃ habuit tempore Arraiamenti pannelli p̃ed ſeu unquam antea vel poſtea ſeu habitant vel commorant aut

aliquis eorundem habitabat vel commorat infra hundred̄ p̄d modo vel Tempore Arraiamenti pannelli illius Et hoc parat est verificare unde pet Judicium Et q̄d pannellum illud Cassetur, &c.

This must be under Councels Hand, and the Proceedings herein you may read before; if they Demur, thus,

Horatur in Lege
W. T.
Joynder in Demurrer
G. D.

The Form of a Challenge made by the Defendant, because the Plaintiff is the Sheriffs Cousin.

Et sup hoc predictus Defendens p A. B. Attorn̄ suum ven̄ & Calumpn̄ Arraiment̄ pannelli pred̄ quia dic̄ quod pannellum illud fact̄ & arraiat̄ fuit p C.D. Ar̄ modo & Tempore Arraiament̄ pannelli p̄d dic̄ Com̄ pred̄ qui quidem vic̄ est Consanguineus E.H. gen̄ modo dimissoris quer̄ in narratione p̄d quer̄ mentionat̄ videl̄t filius G. H. gen̄ filij K. L. filie M. N. filij O.P. Patris Q. R. Matris pred̄ E. F. modo dimissoris quer̄ in nar̄ pred̄ nominat̄ Et hoc parat̄ est ℣ificare unde pet Judic̄ & q̄d pannellum illud cassetur, &c.

If the Plaintiff deny the Kindred and Affinity, then thus,

Nient Cousin par le manner
W. T.
est Cousin
G. D.

Then

Then are two or more Triors ſworn, but ſeldom more than two, and (after they have heard the Proofs and Evidence given to make good the Defendants Plea) they give their Verdict accordingly.

Note the Plaintiff may, if he pleaſe, Demur upon the Challenge.

A Challenge to the Array, becauſe no Knight was returned upon the Jury.

Et ſup hoc prędictus Comes p A. B. Attorn ſuum ven & Calumpn Arraiament pannelli Aſſiſe prędo quia dic qđ ipe eſt & Tempore Arraiamenti pannelli illius & antea fuit & adhuc eſt unus magnat & pariũ hujus Regni Angliæ & vocem & locum in quolibet Parliamento ejuſdem Regni habens Et qđ Arraiament Aſſizę pannelli prędo Arraiat fuit p C. D. Mil nuper vic prędo Com E. nullo Milite in eodem pannello Arraiament illius ñiat & retorn exiſtent ſicut eſſe debuit ſecundum legem hujus Regni Angliæ & hoc parat eſt verificare unde pet Judic Et quod pannellum illud Caſſetur, &c.

Vies Tiel Challenge in le liure de Monſieur Plowden, & Demurrer ſur ceo, ſoinder in Demurrer & Judgment que le pannel ſoit caſſe en le Caſe del Count de Darbie, fo. 117.

A Challenge againſt the Sheriff for Returning the Jury at the Inſtance, Requeſt and Denomination of the Plaintiff.

Et ſup hoc eadem A. B. p C. D. Attorn ſuum ven & Calumpn Arraiament pannelli ejuſdem Jure quia dic qd pannellum illud fact & arraiat fuit p E. H. Mr modo vic Com pred & Miniſtros ſuos ad denominationem & promotionem ipſius quer in favorem ejuſdem quer & hoc parat eſt verificare, unde pet Judic & quod pannellum illud caſſetur, &c.

To which the Plaintiff may plead that the Array of the Pannel pred bene & equalit factum & arraiat fuit p predictum vic & Miniſtros ſuos, &c. juxta officij ſui debit.

Or the Plaintiff, if he will, may confeſs it: But if he plead, then the Judges immediately aſſign Tryors to try the Array, which ſeldom exceed two, who being choſe and ſworn, the Aſſociate or Clerk in Court doth declare and rehearſe unto them the matter and cauſe of the Challenge, and after he hath ſo done, concludes to them thus. And ſo your Charge is to enquire whether it be an even and Impartial Array, or a favourable one: And if they affirm it, then the Clerk enters underneath the Challenge,

Affirmatur.

But

But if the Triors find it favourable, then thus,

Calumpnia vera.

A Challenge becauſe that the Town is within an Hundred of which the Plaintiff is Lord, and prays a Writ to the next Hundred.

Et ſup hoc pred A. dic quod predicta villa de Dale in qua translgr pred facta fuit eſt infra hundred de B. Et quod ipſe eſt Dñs ejusdem hundredi quodque omnes lib Tenentes infra hundred illud ſunt infra diſtrictionem ipſius A. Et ea de cauſa pet hre Dom Regis de venire faciend hic xij, &c. ad triand exitum predictum de pror' vicin in Com pred extra hundred pred ville de B. pror' adjacen vic Com pred dirigend Et quia pred Defendens hoc non dedit ei conceditur, &c. Jō precept eſt vic quod venire fac hic in Octab ſcti Hillarii xij, &c. de pror' vicin in Com pred extra hundred pred predicte ville de Dale pror' adjacen p quos, &c. Et qui nec, &c. ad Recogn, &c. quia tam, &c.

Challenge becauſe the Sheriff and two Coroners are Tenants of the Plaintiff, and a Men. fac. awarded to the reſt of the Coroners.

Et ſup hoc pred A. B. dic quod tam pred C. D. Miles nunc vic Com pred qm F. F.

& G. H. duo Coron sunt Tenentes ipsius nunc I. & infra districtionem suam Et ea de causa pet̃ br̃e ipsius Dom̃ Regis de Ven. fac. hic xij. &c. E. A. & R. P., resiõ Coron ejusdem Dom̃ Regis in Com̃ pred̃ dirigenõ ad trianõ exit̃ pred̃ & quia pred̃ W. hoc non dedit ei conceditur, &c. Iõ prec̃ E. A. & R. P. quod Ven. fac. hic, &c.

Challenge where after the last continuance the Cousin of the Plaintiff is made Sheriff after Issue joyned.

Quia tam, &c. Ad quem diem hic ven̄ partes, &c. Et vic̃ non misit br̃e Et super hoc predictus Quer̄ dic̃ quod post ultimam continuationem placiti videl̃ post Octab̃ scti Mich̃s ultimo pret̃ito de quo die loquela pred̃ ult̃ continuat̃ fuit hic usque ad hunc diem scilicet tali die ultimo pret̃ito Dominus Rex nunc p̄ l̃ras suas patentes commisit cuidam A. B. mihi custodiam Com̃ p̄d̃ quarum quidem literarum paten̄ pretextu idem vic̃ Com̃ illius jam existit Quiquidem A. B. est Consanguineus pred̃ quer̄ vizt̃ fil̃, &c. Et ea de causa pet̃ breve Domini Regis de Venire fac̃ hic xij, &c. Coron Dic̃ Com̃ Regis Com̃ pred̃ dirigenõ Et quia predictus Defendens hoc non dedicit ei conceditur, &c. Et prec̃ est Coron Dom̃ Regis Com̃ pred̃ quod Ven̄ fac̃, &c.

Chal-

Challenge becauſe the Sheriff is of Councel with the Plaintiff, and hath received Fees, and the Defendant doth deny the Challenge, therefore the Venire facias awarded to the Sheriff notwithſtanding.

Et ſup̃ hoc p̃dictus quer̃ dic̃ quod quidam A. B. vic̃ Com̃ p̃ed̃ modo exiſtit quiquidem A. B. eſt de conſiliis ipſius quer̃ & habet de eodem quer̃ Annuum Redditum ſive feod̃ xx l. Et ea de cauſa pet̃ br̃e Dom̃ Regis de ven̄i facien̄ hic xij, &c. Coron̄ Dom̃ Regis Com̃ p̃ed̃ dirigen̄ Et quia p̃dictus defendens hoc dedic̃ Ideo non obſtante allegatione p̃dic̃ quer̃ p̃ec̃ eſt vic̃, &c.

Challenge becauſe the Plaintiff is Brother to the Sheriff.

Et ſuper hoc idem querens dic̃ quod A. B. miles vic̃ Com̃ p̃dic̃ exiſtit & frater ejuſdem quer̃ & ea de cauſa pet̃ br̃e Dom̃ Regis de Venire facien̄ hic xij, &c. Coron̄ dic̃ Dom̃ Regis Com̃ p̃ed̃ dirigen̄ Et quia p̃ed̃ defendens hoc non dedicit ei conceditur, &c. Ideo, &c.

Challenge where the Plaintiff is Sheriff, and one of the Coroners is his Tenant.

Et ſuper hoc p̃dic̃ Quer̃ dic̃ quod ipſe eſt vic̃ Com̃ p̃dic̃ & quod ſunt in eodem Com̃ Duo coron̄ videlt̃ R. H. & R. D. quodque idem

Paſch. 24 H. 8. Rot. 138.

idem R. H. unus Cozon̄ eſuſdem Com̄ tenet de ipſo quer̄ unum Meſſuagium, &c. p̄ fidelitatem & annuum reddit̄ ſingulis annis ad feſta, &c. per equales pozc̄ones ſolvend̄ Et eis de cauſis pet̄ br̄e Dom̄ Regis de Venire fac̄ hic xij, &c. p̄fat̄ R. D. alt̄ Cozon̄ Com̄ p̄dictus dirigend̄ & quia, &c. conceditur Et p̄cept̄ eſt eidem R. D. quod, &c.

Another Challenge to the ſame purpoſe.

Paſch. 20 and 21 H. 8. Rot. 424.

Et ſuper hoc idem quer̄ dic̄ quod A. B. vic̄, &c. tenet decem acras terre cum pertin̄ &c. de ipſo quer̄ ut de Manerio, &c. per fidelitatem, &c. Et ea de cauſa pet̄ br̄e ut ſupra.

Challenge becauſe the Wife of the Plaintiff is Kin to the Sheriffs Wife.

Mich. 31 H. 7. Rot. 453.

Et ſup̄ hoc idem Querens dic̄ quod p̄dicta Bridgitta nunc uxoz̄ H. I. modo vic̄ com̄ p̄z̄ conſanguinea A. uxoz̄is p̄z̄efat̄ quer̄ videl̄t filia M. ſozoz̄is ipſius A. uxor̄ p̄z̄efat̄ quer̄ Et ea de cauſa pet br̄e, &c. Cozon̄, &c.

Challenge becauſe the Plaintiff is the SheriffsServant.

Et ſuper hoc idem Quer̄ dic̄ quod ipſe eſt ſerviens & de lib. R. T. militis modo vic̄ Com̄ p̄ & ea de cauſa, &c.

Chal-

Challenge after the Jury Impannelled, return'd and called, becauſe the Priee in Aid is Sheriff, and of the Councel of the Plaintiff, and a Diſtringas Jur' with a 10 Tales Cozon awarded.

Et modo hic ad hunc diem ven̄ tam pred̄ R. ac p̄dicti J.S. & W.V. qui ſe ſeparatim junxer', &c. quam pred̄ W. M. p Attorn̄ ſuum pred̄ & Jur' inde impannellat' exact', quidam eorum ven̄ & quidam eorum non ven̄ prout patet in pannello, &c. & ſuper hoc pred̄ R. H. ac pred̄ J.S. & W.V. qui ſeparatim junxer', &c. dic' quod pred̄ J.S. modo vic' Com̄ pred̄ exiſtit quodque idem J.S. eſt de feodo pred̄ W. & conſilio in premiſſis & aliis negociis ſuis & aliis de cauſis pet' breve de diſtrinḡ Jur' Jure predicte unacum decem talibus de viſu pred̄ eis imponend̄ Cozon̄ Dom̄ Regis Com̄ predic' dirigend̄ ſuper quo queſit' eſt a predicto W. M. ſiquid pro ſe habeat vel dic' ſciat quare breve illud Cozon̄ Dom̄ Regis Com̄ pred̄ diſtrinḡ Jur' Jure pred̄ unacum decem talibus de viſu pred̄ eis imponend̄ ratione premiſſorum fieri non debet quia dic' quod non Ideo precept' eſt Cozon̄ Dom̄ Regis pred̄ quod diſtrinḡ Jur' Jure pred̄ p omnes terras, &c. & quod de ixit', &c. Ita quod habeat corpora, &c ad fac' Juram pred̄ Et appon̄ ei decem tales, &c.

Sur Hill. 9 H. 8. 1343.

Chal-

Challenge becauſe the Plaintiff is one of the Sheriffs of London, and the Venire fac awarded to the other Sheriff.

Et ſuper hoc pdictus Querens dic quod ipſe ac quidam Johannes Blunt miles ſunt vic London & pro eo quod ipſe eſt unus vic London pet quod proceſſus de Venire fac hic rij, &c. ad trianꝺ erit predictum prefat J. B. tantum dirigetur, &c. & queſtꝰ eſt a prefat defenꝺ ſiquid dicere ſciat quare proceſſum illi prefat Johanni Blunt altero vic, &c. tantum ea ratione fieri non debet qui dic quod non. Ideo pcc eſt eidem Johanni Blunt altero vic, &c. quod Venire fac in Octab Pur: Ita quod predictus querens in nullo ſe intromittat rij, &c. per quos, &c. & qui nec, &c. ad recogn, &c. qui tam, &c.

Challenge to the Deputy Sheriff, becauſe he Impannell'd and returned the Jury at the inſtance and denomination of the Plaintiff.

Et ſuper hoc pred Defendens Calumpn Arraiamtum pannelli Jurate pred eo quod pannellum illud factum & arraiat fuit p T. W. ſub-vic Com pred ad denominationem pred quer & in favorem & promotionem ejuſdem quer quequidem Calumpnia per Triatores ad hoc elect & Jurat Comperta eſt vera Ideo, &c.

Chal-

Challenge by the Kings Serjeant upon an Indictment of Felony, becauſe the Sheriff returned the Jury of Life and Death, at the inſtance and requeſt and denomination of the Priſoner.

Laurentius B. nuper de A. in Com̃ pred̃ geñ capt̃, &c. Recitando totum indictamentum uſque Ideo fiat inde Jurat̃, &c. ſuper quo A. B. ſerviens Dom̃ Regis ad legem pro eodem Domino Rege Calumpñ Arraiament̃ pannelli Jurat̃ p̃ quia dic̃ quod pannellum illud fact̃ & arraiat̃ fuit p̃ Henricum Forteſcue vic̃ Com̃ pred̃ ad denominationem predict̃ Laurentij & in favorem & promotionem ejuſdem Laurentij quequidem Calumpñ p̃ Triatores inde Jur̃ compert̃ eſt vera Ideo pannellum amoveatur & caſſetur, &c. & Venire fac̃ awarded to the Coroner.

Challenge by the Kings Serjeant for the King to ſome of the Jury for Default of Freehold, to the value of 40 s. per Annum.

Super quo facta publica proclamatione pro Domino Rege, &c. ac quidam J. G. miles ſerviens dic̃ Dom̃ Regis ad legem nunc pro eodem Domino Rege ven̄ & quidam Jur̃ modo compareñ videlt̃ J. L. in Juram̃ pred̃ Jurat̃ exiſtit Et quia reſñ Jur̃ ejuſdem Jur̃e modo Compareñ non habent terras ſeu tenementa in Com̃ pred̃ ad annuum valorem xl s. a pannello illo penitus extrahuntur, &c.

Mich.

Entry of a Challenge after Iſſue joyned where the Sheriff is amoved, &c.

Between *Barkley* and *Jefferſon.*

Mich. 23 and 24 Eliz. Rot. 109. Therefore came thereupon the Jury before our Lord the King at Weſtminſter, the day, &c. and who neither, &c. to Recognize, &c. becauſe as well, &c. the ſame day is given to the ſaid Parties there, &c. at which day before the ſaid King at Weſtminſter, came the ſaid Parties by their ſaid Attornies, and the Sheriff ſent not the Writ; and upon this, the ſame Plaintiff ſaith, That after the laſt continuance of the ſaid Plea, that is to ſay, after the Saturday next after, &c. now laſt paſt; from which day the ſaid Plaintiff was continued here until this day, that is to ſay, the day, &c. R. P. Eſq; late Sheriff of the ſaid County of E. from the ſame Office of Sheriff of that County was duly amoved, and the ſaid King now by his Letters Patents hath committed unto one T. P. Knight, the Cuſtody of the ſaid County of E. by pretence of which ſaid Letters Patents, the ſaid T.P. now remaineth Sheriff of that County, which ſaid T. P. of A. at A. aforeſaid, took to his Wife Anne of the Blood of M. now the Wife of him the Plaintiff; that is to ſay, the Daughter of R. D. the Son of W.D. Knight, Father of Anne, Mother of the ſaid M. now Wife of him the Plaintiff; which ſaid T.P. Knight, and A. had Iſſue betwæn them A. P. yet alive, and in full life remaining, at A. aforeſaid, and this he is ready to prove, &c. And for that cauſe he prayeth a Writ of our Lady the now Quæn, of Venire fac to try the ſaid Iſſue in form aforeſaid joyned, to be directed to the Coroners of the ſaid County; and becauſe the ſaid Defendant doth

doth gain-say, and doth not grant that to be true, therefore notwithstanding the same Challenge, a Command is to the Sheriff, that he make to come Twelve, &c. of the Visne of B. by whom, &c.

Challenge gain-said.

Easter Term, 38 H. 8. Rot. 558. And hereupon the Defendant doth Challenge the Array of the Pannel of the said Jury, because he saith, That that Pannel was made and arrayed by A. and C. Coroners of the said County, at the Denomination and in favour of the Pannel of the said Plaintiff, and this he is ready to verifie, and requesteth that the same Pannel may be quashed. And the said Plaintiff saith, That the said Pannel by the said Coroners, was well and equally made; and not at the denomination, nor in favour, nor in promotion of the said Plaintiff; whereupon the said Justices by the consent of the said Parties, did chuse and assign D. and E. two of the said Jury now appearing, to try the said Challenge; which said Tryors being elected and tryed, say upon their Oaths, That the said Pannel was well and faithfully made and arrayed by the said Coroners, and not at the denomination, neither in favour, nor in promotion of the said Plaintiff; whereupon the Jurors of the said Jury being called, tryed and sworn, say, &c.

Challenge to the Array, because the Coroners made the Pannel at the Denomination of the Plaintiff.

A Precedent of Challenge to the Array.

May it please you, Mr. Baron, This Enquest you ought not to take, for that Sir John Ramsden, Knight, Sheriff of the County of

York, who did return the Pannel between the said A. Plaintiff, and B. Defendant, is Cousin to the Plaintiff, &c. and shew how of Kin, &c. and so where the Challenge is for lack of Hundredors, or other principal Challenge, put it down, &c. and this he is ready to aver, whereof he prays Judgment, and that the said Pannel be quashed.

Or thus, And now at this day S. &c. comes the aforesaid J. S. Plaintiff, and J. B. Defendant by their Attornies, and the Jurors also Impannelled and demanded did come, and thereupon the said J. B. doth Challenge the Array of the Pannel aforesaid, because &c.

This must be put in Writing, but under Counsels Hand, where the Challenge is to the Poles, it is a short way by a Verbal Challenge; see the Learning of this is excellent and copious in our Book.

A Precedent of a Plea after the last Continuance.

And now at this day, &c. comes such a one Defendant, by J. C. his Councel, and saith, This Action the Plaintiff against the Defendant ought not to maintain; for that after the Quindene of the Holy Trinity last past, from which day until such a day in Michaelmas-Term next, unless the Justices of Assises come before such a day, &c. the Action aforesaid is continued, &c. the Plaintiff by his Deed dated, &c. did Release, &c. and shew, &c. the Matter what it is, whether in abate-

abatement in Bar dilatory, or peremptory, as the Case is, &c. and this he is ready to aver.

Note, Brook in his Abridgment, Tit. Continuance. 61 and 83. says, That after the Inquest is awarded to inquire of Damages, The Defendant cannot plead a Plea Puis le darrein Continuance, because he hath no day in Court to plead.

The day of Nisi prius and day in Bank are all one; so that a Release made betwixt these days cannot be pleaded in Bank; but it seems that a Release made between the day of the Venire facias returned, and the Writ of Nisi prius awarded, and the day of the Nisi prius may be pleaded at the day of the Nisi prius, but not after the Verdict, 21 H. 6. f. 10. Bro. Tit. Joins, &c. 31 Tit. Continuance, 76. 42, 27, 13.

A Man shall have but one Plea after the last Continuance; for the Plaintiff shall not be delayed ad infinitum, 16 H. 7. 11. Bro. Tit. Continuance, 59. 41. 45, 46. 5. 21.

After the Inquest taken by default, and before Judgment, the Defendant came and pleaded an Arbitrement made after the last Continuance, and by the Opinion of the Court, he had no day in Court to plead this Plea, and was said, That he could plead no Plea in such Case, but as Amicus Curiæ, and of matter apparent he shall be received; otherwise, he must resort to his Audita Querela. 21 H. 7. 33. Broke Ibid. 38.

But if the Jury remain for default of Jurors, the Defendant may plead a Releaſe, &c. at the day in Bank Puis le darrein continuance, although he did not offer it at the Niſi prius, otherwiſe if the Jury had been taken at the Niſi prius. 22 H. 6. 1. Broke ib. 30.

If it be pleaded at the Niſi prius, the Court Record the Plea, and diſcharge the Inqueſt, and give day to the Parties in Bank. Ibid. 34. 8.

In Debt after Iſſue joyned, the Defendant at the Niſi prius pleaded payment of part after the latter continuance in abatement. And the Jury being diſcharged, and the Plea adjourned in Bank; for that no place of payment was pleaded, the Plaintiff had Judgment to recover his Debt, becauſe after Iſſue joyned, no Reſpondes ouſter can be awarded. L. 5. E. 4. 139. Aleyn's Reports 66. in the Caſe of Beaton and Forreſt.

Now, although when difficulty ariſes in the Evidence, the matter is moſt commonly (of late) found ſpecially, and Demurrers on the Evidence are ſeldom uſed; yet in aſmuch as it is ſometimes done, and that our Practicer may be prepared with an Authentick Precedent for that purpoſe, I ſhall tranſcribe one out of Cokes Entries, f. 134. viz.

ffr Poſtea. Poſtea die & loco Infra Content Coram Jacobo Dyer Milite Capitali Juſticiar Dom̃ Regine de Banco & Nicholao Barham uno ſervient dict Dom̃ Regine ad Legem Juſtic ipſius Domine Regine ad aſſiſas in Com̃ N. Capien̄ aſſign p formam Statuti, &c. Ven infra nominat J. A. qui infra ſcript H. C. p

at-

atturnat̃ suos infra content̃ & Jur̃ Jure unde infra fit mentio Exact̃ similit̃ ven̄ Qui ad veritatem de infra content̃ dicend̄, electi, triati, & Jurati fuer̃ Super quo * pred̄ H. per quendam J. B. de Consilio ipsius H. C. manutentione exitus interius junct̃ Coram pred̄ Just̃ Jur̃ pred̄ in Evidentijs ostens̄ & dic̃ quod, &c. [Here recite the Evidence truly] unde petit Judicium & quod Jur̃ pred̄ veredict̃ suum de & sup̄ infra content̃ pro ipso H. reddant, &c.

* *E. D.* De consilio pred. *J. A.* produxit quosdam *J. D.* & *T. E.* ex parte Quer. ad probandum Exit. pred. qui quidem *J. D.* jurat. existen. dedit in Evident. Jur. pred. & juravit in his Anglicanis verbis, videlicet, *That upon discourse*, &c. [*and so recite his Evidence.*] Et pred. *T. E.* jurat. existen. dedit in Evident. Jur. pred. & juravit in his Anglicanis vebis, videlicet, *That*, &c. [*And so recite his Evidence,*] Et supra inde *H. P.* ex consilio Def. dixit quod materia pred. superius in eadem dat. non fuit sufficiens in lege ad manutenend. exit. pred. Et moratur in Lege super Evidenc. pred. Et hoc, &c. Et pet. &c. Ex pred. causis ex parte pred. Quer dixit quod fuit sufficiens in Lege Et hoc, &c. Et pet. &c. super quo Jur. pred. super sacrm' suum dic. si lex sit cum Quer. quod pred. Def. est Cul. de infra content. modo & forma prout pred. quer. interius narravit quodq; pred. quer. occasione premiss. sufficient. dampn. ad 11 *l.* ultra mil. & custag. Et pro miss. & custag. illis ad 40 *s.* Et si Lex sit cum Def. Jur. pred. dic. quod pred. Def. non est cul. modo & forma prout pred. quer. interius versus eum queritur.

Et pred̄ J. A. p̄ quend̄ C. J. de Consilio suo dic̃ qd̄ materia pred̄ p̄ pfat̃ H. C. Jur̃ p̄d̄ superius in Evidentijs ostens̄ minus suff̄ in lege existit ad proband̄ exitum interius Junct̃ pro parte ejusdem H. quodq; ipse ad materiam illam in forma p̄d̄ in Evident̃ ostens̄ necesse non habet nec per legem terr̄ tenet̃ respondere, & hoc paratus est verificare, unde pro defectu sufficient̃ mater̄ Jur̃ pred̄ in hac parte ostens̄. idem J. petit Judic̃, & quod Jur̃ de Veredict̃ suo super Exit̃ pred̄ reddend̄ exone-

rentur & debitum suum infra spec una cum dampn̄ suis occasione detent̄ debiti illius sibi adjudicari, &c.

Joynder. Et p̄d H. C. Ex quo ipse suffic̄ mater in lege ad manutenend̄ exit̄ infra content̄ p̄o parte ipsius H. Jur̄ p̄d superius in Evident̄ ostens. q̄d ipse pat̄ est verificare, quā quidem materiā p̄d J. non dedicit nec ad eam aliqualiter respond̄ sed verificationem illam admittere omnino recusat pet̄ Judic̄, & quod p̄dict̄ J. ab actione sua p̄d̄ versus eum habend̄ p̄cludatur, ac quod Jur̄ p̄d̄ de Veredict̄ suā super exit̄ p̄d̄ reddend̄ exonerentur, &c.

A Precedent of a Demuurrer upon the Evidence.

And now at this day the said Plaintiff and Defendant by their Attorneys did appear, and the Jury likewise did appear and were sworn, &c. upon which Sir T. W. Serjeant at Law, of Counsel with the Plaintiff, gave in Evidence so and so, and repeat it truly, and did require the Jurors to find for the Plaintiff, upon which J. C. of Counsel with the Defendant saith, That the Evidence and Allegations aforesaid alledged, were not sufficient in Law to maintain the Issue joyned for the Plaintiff, to which the Defendant needeth not, nor by the Laws of the Land is not holden to give any Answer, wherefore for default of sufficient Evidence in this behalf, the Defendant demands Judgment, that the Jurors aforesaid of giving their Ver-

Verdict be discharged, &c. and that the Plaintiff be barr'd from having a Verdict, &c. Then the Plaintiff joyns and says, That he hath given sufficient matter in Evidence, to which the Defendant hath given no Answer, &c. and demands Judgment, and that the Jury be discharged, and that the Defendant be Convicted; then the Jury may give Damages, if Judgment shall happen to be for the Plaintiff, &c.

A Bill of Exception.

Memorandum, That the 1st day of August, Anno 1650. before T. P. and W. Justices of our said Lord the King, for taking Assizes in the said County assigned, in a Plea of Trespass and Ejectment, which J. S. in the Court of our said Lord the King before himself, by Bill doth prosecute against E. B. supposing by the said Bill, that the aforesaid T. B. &c. [And recite the substance of the Declaration, or what it is, &c. and the Issue, and then what the Evidence to prove the Defendant guilty was, &c.] Which here was a Surrender of a Copy-hold out of Court, &c. and that he desired the Jury aforesaid to give their Verdict for the said T. B. of and upon the Premisses, and that he likewise desired the Judges aforesaid, that they would inform the Jury aforesaid, that the Surrender aforesaid out of Court made, was good and effectual in Law, and the aforesaid Justices, the aforesaid Surrender of the Land aforesaid, with the Appurtenances made out of Ebor. sc.

Court, of the Manor aforesaid, in form aforesaid, did affirm to the said Jurors was not good in Law, by which the said Thomas for that the aforesaid matters to the said Jurors in Evidence shewed, doth not appear, &c. did request of the said Justices, according to the form of the Statute in such Case provided this present Bill, which doth contain in it the matter aforesaid, above by him to the Jurors aforesaid shewed, by which the said Justices, at the request of the said Thomas, this Bill have sealed at D. aforesaid.

Clayton's Rep.

Vide A Bill of Exceptions in the Kings-Bench, upon a Tryal at the Assises in Sam. Vernon's Case, in Brownlows Entries Latine Rediviv. f. 129. Where the Declaration, Plea, Issue and Continuances are set forth, and then the Exceptions. A very useful Precedent.

De Termino Sancti Hillarij, Anno Regni Domini Car. secundi, nunc Regis Anglie, &c. 33 and 34.

Villa ff. Samuel Verdon gen' un' Cler' &c. [Here recite all the Pleadings and Continuances of the Record.] Quiquidem separat' exit' in forma pred' int' partes p' d' respective junct' postea scilt' ad Assisas tent' apud Castr' Cant' in Com' p' d' coram W. Mountague Capitali Baron' Scaccarii dicti Dom' Regis & H. Windham, Mil' un' Justic' dicti Dom' Regis de Banco Justic' Dm' Regis ad Assisas p' d' pro Com' capiend' assign' secundum formam Statut', &c. die Martis 14 die Martij Anno Regni dic' Dm'i Regis nunc 34. ad triacon' deven' Ad quem diem coram Justic' p' d' ven' tam pred' Sam. Verdon in propria per-

persona sua quam ꝓd I. F. per Attorn suum ꝓed & Jur Jurat ilt Impannellat exact similiter ven & in Jur ilt separat exit ꝓed in forma ꝓed respective junct jurat fuer.

Et sup triatione ilt in forma ꝓd habit in manutentione ꝓd exit superius ult junct ꝓd S. V. dedit in evident Jur sic impannellat & Jurat Quod, &c. [Here recite what he gave in Evidence,] Ac sup inde Consiliarij ex parte ꝓed I. F. interposuer & insistebant quod materia ꝓd Jur ꝓd in Evidenc sic ut ꝓfertur dat non fuit sufficiens in Lege ad manutenend exit ꝓed ex parte ꝓed S. V. Et ea de causa petier e ꝓfat Judice quod mater illa foret seperalit compt Nihilominus Justic ꝓd declaraver opinion sua quod mater ꝓd Jur ꝓd sic ut ꝓfertur in Evidenc dat fuit sufficien in Lege ad manutenend exit ꝓd ex parte ꝓd S. V. si Jur ilt crederent & invenirent quod, &c. Ac super inde ꝓfat Justic per directiones suas secund opinion sua ꝓd poluer consideration inde Jur ꝓd sup quo consiliarij ꝓfat I. F. conceper quod per legem terre materie ꝓd ex parte ꝓfat S. V. Jur ꝓd in evidenc sic ut ꝓfertur dat (licet Jur ilt crederent & invenirent qd, &c) non fuer in lege sufficien ad manutend exit ilt ꝑ ꝓd S. V. Ideo poluer exception sua opinion Justic ꝓd & petier qd ꝓfat Justic opponerent man & sigill sua huic bille secund forma statuti in hujusmodi casu edit & provis ac superinde ꝓfat H. Windham appoluit manus & sigilla sua advinde secundum forma Statuti ꝓd dat apud Castrum Cant 14 die Marcij Anno Regni dict Dom Regis nunc 34. H. Windham.

1. West-

1. Westm. 2. 31. 13 E. 1. When the Justices will not allow a Bill of Exception upon prayer, if the Party impleaded tender the same unto them in writing, and requires their Seals thereunto, they or one of them shall do it.

2. If the Exception sealed be not put into the Roll, upon Complaint thereof to the King, the Justice shall be sent for, and if he cannot deny the Seal, the Court shall proceed to Judgment according to the Exception.

This Bill of Exception is given by the Statute of Westm. 2. Cap. 31. before which Statute a Man might have had a Writ of Error; for Error in Law, either, in redditione Judicij, in redditione Executionis or in Processu, &c. which Error in Law must be apparent in the Record, or for Error in fait; by alledging matter out of the Record, as the death of either Party, &c. before Judgment. But the mischief was if either Party did offer any Exception, praying the Justices to allow it, and the Justices over-ruling it, so as it was never entred of Record, this the Party could not allign for Error, because it neither appeared within the Record, nor was any Error in fait, but in Law, and so the Party grieved was without remedy until this Statute was.

This Act extendeth to all Courts, to all Actions, and to both Parties, and to those who come in their Places, as to the Vouchée, &c. who comes in loco tenentis.

It

It extendeth not only to all Pleas Dilatory and Peremptory, &c. to Prayees to be received, Oier of any Record or Deed, and the like; but also to all Challenges of Jurors and any material Evidence given to any Jury, which by the Court is Over-ruled. 2. Inst. f. 427.

All the Justices ought to Seal the Bill of Exceptions, yet if one doth it, it is sufficient; if all refuse, it is a contempt in them all. And the Party grieved may have a Writ grounded upon this Statute, commanding them to put their Seals Juxta formam Statuti & hoc sub periculo quod incumbit nullatenus omittatis.

The Party must pray the Justices to put their Seals; but if they deny it they may be commanded, and may do it after Judgment.

If the Party grieved be dead, his Heirs or Executors, &c. according to the Case, may have a Writ of Error upon this Bill of Exceptions. And no diminution can be alledged, for the Parties are confined to the matter in the Bill.

If the Justice dye before he acknowledgeth his Seal according to the Act, a Scire Facias shall go to his Executor or Administrator, for the death of the Judge is the Act of God, which shall not prejudice the Party: as in the Case of a Certificate of the Marshal of the King's Host, that the Person outlawed was in the King's Service beyond Sea, in a Writ of Error a Scire Facias shall go to the Marshals Executor or Administrator upon shewing the Certificate.

If

If the Judge denyeth his Seal, the Party may prove it by Witnesses, ib.

Error of a Judgment at the Grand Sessions in the County of Pembroke, in an Assise of darrein Presentment, by Henry Cort against the Bishop of St. Davids, Dorothy Owen and others, for the Church of Stackpool.

The fourth Error assigned was, because the Issue being, whether H. Cort did last present one R. D. the last Incumbent, who was Instituted and Inducted upon his Presentation: The Plaintiff offered in Evidence Letters of Institution, which appeared to be, and so mentions that they were sealed with the Seal of the Bishop of London, because the Bishop of St. Davids had not his Seal of Office there, and those Letters were made out of the Diocess; and the Defendant had demurred thereupon, That those Letters were insufficient, and the Demurrer was denied, which Jones said was an Error, because they ought to have permitted the Demurrer, and should have adjudged upon it. But it was held, that the not admitting of the Demurrer ought not to be assigned for Error; for when upon the Evidence the matter was over-ruled by the Justices of Assise, that was a proper cause of a Bill of Exceptions, and the remedy which the Statute appoints in that Case; And for the matter of the Letters of Institution sealed with another Seal, and made out of the Diocess, it was held they were good enough, for the Seal is not material, it being an Act made of the Institution, and the Writing and Sealing

is

is but a Teſtimonial thereof, which may be under any Seal, or in any place. But of that point they would adviſe. Cro. 1 part, 340.

The Party grieved may have a Writ of Error, and may aſſign Error upon that Bill ſealed, and alſo in the Record, or in one of them at his pleaſure. F. N. B. f. 21. N. Ex rigore juris, it need not be allowed in Arreſt of Judgment. 27 H. 8. in Tatum's Action upon the Caſe.

Note, This Bill is to prevent the precipitancy of the Judges, and ought to be allowed in all Courts, and in all places of Pleadings, and may be put in at any time before the Jury have given their Verdict.

But this Bill is rarely uſed, there being impar congreſſus, betwixt the Judge and the Councel; and the prudence of the Judges induce them to find ſpecial Verdicts in Caſes of doubt and difficulty.

A Releaſe pleaded at the Aſſiſes after Iſſue joyned.

Et prd Defend in propria perſona ſua ven & dic quod prd Juſtic Dom Regis hic ad caption Jur prd inter ipſum Defend & prefat Quer procedere non debent quia dic quod poſt xij diem F. ult preterit de quo die Jur prd inter partes prd continuat fuit, & ante hunc diem [ſcilt diem de Aſſiſe] ſcilt primo die M. Anno, &c. apud, &c. prd. quer per nomen, &c. remiſit, relaxavit, &c. Et hoc, &c.

unde

unde pet quod Justic pd ad captionem Jur pd ulterius procedere noluit.

The Death of one of the Defendants pleaded after the last Continuance.

Et pred Defend per A. B. Attorn suum ven & pd T. non ven & sup hoc pd Defend dic quod post ult continuationem placiti pd scilt post xv. Pasche ult preterit de quo die loquela pred ult continuat fuit hic usque ad diem scilt in Crō sc. Mich tunc prox sequen & ante eundem diem scilt decimo die Maii ult preterit pred T. apud A. pd obiit. Et pet quod nul proces nec aliquid aliud in placito pd ulterius ejus pretat T. fiat & quia pd I. Eyre hoc non dedic. Ideo nul proces nec aliquid aliud in placito pd ejus pretat T. fiat, &c.

A Baron Challenges the Pannel becauſe no Knight was returned of the ſame.

Et sup hoc idem T. calumpniat arraiment pannelli pd quia dic quod ipse est & tempore arraiament pannelli illius fuit Baro hujus Regni Angliæ locum & vocem habens in quod Parliamento hujus Regis quodque in eo pannello nullus Miles nominat & retent exist it. Et hoc paratus est verificare unde petit Judicium & quod pannellum illud cassetur, &c.

Ev-

Evidence, and Demurrer upon Evidence, Pi-dleton against Baker. Cro. Eliz. 42. f. 751.

In Ejectment, It was held by all the Court upon Evidence to a Jury, That if the Plaintiff give in Evidence any matter in Writing or Record, or a Sentence in the Spiritual Court, (as it was in this Case) and the Defendant offers to demur thereupon, the Plaintiff ought to joyn in the Demurrer, or wave the Evidence, because the Defendant shall not be compelled to put matter of difficulty to lay Gens, and because there cannot be any variance of a matter in Writing. But if either Party offer to demur upon any Evidence given by Witnels, the other, unless he pleaseth, shall not be compelled to joyn, because the credit of the testimony is to be examined by a Jury, and the Evidence is uncertain, and may be enforced more or less; but both Parties may agree to joyn in Demurrer upon such Evidence. And in the Queens Case, the other Party may not demur upon Evidence shewn in Writing or Record, for the Queen, unless the Queens Councel will thereto assent, but the Court in such case shall charge the Jury to find the matter specially, as appears 34 H. 8. Dyer 53. But this is by Prerogative. Vide Lib. 4. 194. the same Case, and 1 Inst. 72. Where my Lord Cook says, If the Plaintiff in Evidence shew any matter of Record, or Deeds, or Writings, or any Sentence in the Eccle-

siastical

ſtaſtical Court, or other matter of Evidence by Teſtimony of Witneſſes, or otherwiſe, whereupon doubt in Law ariſeth, and the Defendant offer to demur in Law thereupon, the Plaintiff cannot refuſe to joyn in Demurrer, no more than in a Demurrer upon a Count, Replication, &c. and ſo e Converſo, may the Plaintiff demur in Law, upon the Evidence of the Defendant, but the Kings Counſel ſhall not be enforced to joyn in Demurrer; but in that caſe the Court may direct the Jury to find the ſpecial matter. So that the ſeveral ſorts of Evidence make no difference, as to the joyning in Demurrer. 1 Part Leon. 206.

Joynder in Demurrer.

Darroſe againſt Newbott. Cro. 4 Car. f. 143.

In Error of a Judgment in Bridgwater: The Error aſſigned was, for that, in an Action upon the Caſe ſur Aſſumpſit, the Parties being at Iſſue, a Demurrer was joyned upon the Evidence, and thereupon the Jury diſcharged, and afterwards Judgment was given for the Plaintiff, and a Writ of Inquiry of Damages awarded, and Damages found, and Judgment thereupon; where the Jurors which came to find the Iſſue, although by the Demurrer they were diſcharged of the Iſſue, yet ought to have aſſeſſed Damages conditionally, if Judgment ſhould be given for the Plaintiff. And in proof thereof was cited Newis and Scholaſtica's Caſe, Plo. Com. f. 408. and the old Book of Entries, &c. And it was ſaid by

by the Court, if these Precedents be good Law, then it may be enquired of by the same Jury conditionally: But it may be as well inquired of by a Writ of Inquiry of Damages, when the Demurrer is determined, and the most usual course is, when there is a Demurrer upon Evidence, to discharge the Jury without more inquiry. But as my Lord Chief Baron Montague held at the Assises in Cambridgshire, 1682. it may be one way or other.

Note, He that demurs upon Evidence, admits the Evidence to be true.

In the Assise by R. Newis and Scholastica his Wife, against Lark and Hunt, which was taken by default. The Precedent in Plowd. Com. as to this matter runs thus,

Recogn Assise p̄ exacti venerunt, qui ad veritatem de p̄missis dicend̄ electi, triati, & jurati fuerunt, sup̄ qno Willielmus Benlows Serviens ad legem de consilio p̄dictorum R. & Scholastice in manutentione Assise p̄ cozam Justic' Dom̄ Reg̃ de Banc' hic in evident' Recognit' Assise p̄ dixit, quod diu ante diem impetrationis Assise p̄ quidam H. Clark fuit seisitus, &c. Et condidit testamentum & ultimam voluntatem suas in scriptis, inter alia, unde pars inde in hiis Anglicis verbis sequitur videl' [Also this is the last Will and Testament of me the said Henry Clark, for and concerning, &c.] Et ulterius idem Serviens ad legem ex parte p̄d̄ R. & S. dedit in evident' eisd̄ Recognit' quod, &c. Quorum p̄tertu idem jam Serviens ad legem exigit quod idem Recogn' Assise p̄ Assisam p̄ de tenementis p̄ cum per-

tiñ in visu, &c. pro parte ipsorum R. & S. triari & comparere debeant, &c. Et veredictum suum dare debent qđ pđ Wl. Lark & J. Hunt dictos R. & S. de tenementis prędđ cum pertiñ in visu, &c. villeisiverant, &c.

Et pđ Wl. Lark & J. H. in propriis personis suis dic' qđ evident & allegation pđ ex parte pđ R. & S. superius allegat minus sufficien in lege existunt ad manutenend Assisam pđ ad quos ipse necesse non habent nec p leg̃ terre tenentur respondere unde pro defectu sufficien evident in hac parte pet judicium quod juratores pđ de veredicto suo in premissis dicend exonerentur, &c. Et quod pđ R. N. & S. ab Assisa sua pđ habend precludantur, &c.

Et pđ R. & S. dicunt quod ex quo ipse sufficien materiam in manutentione Assise pđ in evident recognit pđ ostend quam quidem materiam pđ Wl. Lark & J. Hunt non dedicunt nec ad eam aliqualit respond petunt Judicium Et quod iidem Jurator' inde exonerentur, & quod pđ Wl. & J. de Assisa illa convicantur, &c. Sup quo dict est Recogn pđ quod inquir' que dampna prędđ R. & S. sustinuer' tam occasione villeisine pđ quam pro missis & custagiis suis per ipsos circa lectam suam in hac parte appons si contiñ judicium pro iisdem R. & S. in placito prędđ sup evidentias prędđ reddi Qui quidem Recogn dicunt sup sacram suum quod si contiñ judicium in placito pđ pro pđ R. & S. sup evidentias pđ reddi, iidem R. & S. sustinuer' dampna occasione villeisine prędđ ad 13 s. 4 d. & pro missis & custagiis suis ad 20 s. Et quia

Justi-

Justiciarij hic se advisare volunt de & sup premissis priusquam judicium inde reddant, dies datus est partibus predict, &c.

Note, several Exceptions were taken to the manner of giving the Evidence; First, for that the intire Will was not shewed, but part, and that this being the foundation of the Evidence, the whole Will ought to have been shewed; for there might be some other matter of substance, as a Condition, Limitation, &c. in the parts not shewed. But all the Justices disallowed this Exception, and said, the Party in any Title or Bar, needs shew no more than what makes for him. As in an Act of Parliament, in which are divers branches, 'tis sufficient to shew that branch which serves ones purpose, and not like the Case of a Fine or Recovery of twenty Acres, where I must shew the whole Record, although I am concerned but in one Acre, because the Original is intire, and so is the Record grounded upon it. See also Fulmerston and Steward's Case, Plo. Com. 102. Another Exception was, That the Fine was not shewed under the Seal of the Court, or the great Seal, but one part indented of the Chirograph was only shewn, which the Jurors were not bound to believe, because it wanted a Seal. But all the Justices were against this, and said, the Jury might find the Fine of their own knowledge, without the shewing of the Parties, or they might find it upon the credit of any Witness that had seen it, and the shewing the part indented, is the usual Evidence of

a Fine. (Note, a Fine indented and not exemplified under Seal, &c. shall not be delivered to the Jury, 34 H. 6. 25.) And they said, because it is only the Inducement of the verity to the Jurors, the Party could not demur upon this, for the effect of the matter is, that there is such a Fine which is amongst the Records. And this is the substance of the matter, and the part of the Chirograph is nothing but the Image of the verity, and therefore there could be no Demurrer upon this.

Another Exception was, That the Recovery was not shewed under Seal, or at least that the Roll of this ought to be alledged certainly; but all the Court (except Harper) answered, That upon the general Issue, the Jury might find things that proved or disproved the seisin or disseisin, be they matters of Record or otherwise, and the Jury could not give a rightful Verdict, if they could not find them, and whatsoever they may take conusance of themselves, may be given in Evidence by words, or copies, or other argument of the truth. 'Tis true, in pleading, a Man cannot make a Title by Record, without shewing the same under the Great Seal, and if a Record be pleaded in Bar, a day may be given to bring in the Record under the Great Seal; but such day cannot be given to bring in the Record upon Evidence, but the finding of it by the Jury is sufficient, and they may find it of themselves, although it be not shewed them in Evidence. But perhaps they shall not be bound upon pain of Attaint to find it, if

Stiles 22. *White* and *Pindars* Case.

it

it, be not shewed them under Seal; but nevertheless they may find it, and they do well, if it be true. And by the same reason that they may find it, they may take Instruction of it by any circumstance, which induceth the truth. (Note if it be not necessary to shew the Record, and the Jury may find it without; yet 'tis not fit to be permitted to prove it in such a manner, without shewing the Record, or a true Copy of it.) And the Demurrer upon Evidence goes to the Law upon the matter, and not to the verity, which is admitted, and the effect in Law is denyed, for if the Party will not confess the truth of the matter given in Evidence, then he ought so to say, and put it to the Jury to be tryed, and if they find this, where it is false, an Attaint lies; but a Demurrer upon Evidence never denies the truth of the Fact, but confesses the Fact and denies the Law to be with the Party which shews the Fact.

Vide *Rolls* Tit. Tryal 687.

As to a fourth Exception, for want of alledging and averring that H. Clark, had not any other Issue Male than John and F. (upon a Limitation of a Remainder for want of Issue Male of H. C. and a title made to the Plaintiffs Wife, under that Limitation;) The same Judges answered, that which the Plaintiffs gave in Evidence, is to the intent to perswade the Jury, that they have a good Title, and what they say shall be applied as they intended; and as by presumption no man will say any thing against himself, so it lies on the other side to shew what is against him; and although in Pleading, cer-

tainty ought to be shewed, (to which the other Party must answer, and upon which the Court may judge,) yet in Evidence, so great and exact certainty is not requisite, for the Jury may found their Verdict, (if the matter be ambiguous) upon what is most probable, and by the same reason that which is most probable, is good Evidence, and therefore it shall be intended that H. C. had no other Issue Male, because the other Party did not shew that he had.

The Precedent of a Demurrer upon Evidence in Reniger and Fogassa's Case, in Plow: Com. f. 1. In an Information upon a seizure of Woad Imported, the Customs not being paid, nor any agreement made with the Collector in the Exchequer, where the Issue was, whether the Defendant made an Agreement with the Collector of the Subsidies for the Woad, according to the Act, &c. or not.

Ideo fiat inde inquis ac pro eo quod idem A. Fogassa est alien natus videl apud Civitatem portus Portugalie in Portugalia sub obedientia pō Portugalie Regis, petit medietatem lingue sue, &c. A. B. C. M. R. S. &c. qui ad veritatem de premissis dicendō electi, triati & jurati dicus A. F. in manutentione exitus pō superius ad patr̄ juncti, & ad probandō exit ilr pro parte ipsius A. fore verum produxit pred Tho. Wells Collect Custom & Subsid Domini Regis in porta ville Southampton ac J. S. adtunc & adhuc Clericum sive servient ipsius Tho. Wells in dicto Offic Collect pō nec non quendam J. D.

D. Yeoman ad teſtificand̄ p̄miſſa in placito ipſius A. ſp̄ec̄ fore vera. Qui quidem Tho. Wells examinatus ſup ſacr̄ ſuum coram Baronibus hic p̄ſtitum in p̄miſſis, dicit, quod, &c. [Here recite the Evidence.]

Et p̄d̄ Attorn̄ Domini Regis p̄o eod̄ Domino Rege dic̄ quod evidentie p̄d̄ ſuperius dat̄ minus ſufficien̄ in lege exiſtunt ad manutenend̄ ſeu p̄band̄ exit̄ p̄ed̄ p̄o parte ipſius A. F. ſuperius ad patriam junct̄ unde ob inſufficient̄ earundem evident̄ ac ex quo p̄ evidentias illas non dedicitur forisfactura bonorum p̄d̄ in informatione p̄d̄ ſp̄ec̄ idem Attorn̄ Domini Regis p̄o ipſo Domino Rege petit Judicium ac quod eadem bona remaneant Domino Regi forisfacta juxta formam ſtatuti p̄d̄. Et p̄d̄ A. F. dic̄ quod evidentie p̄ed̄ ſuperius ex parte ipſius A. F. dat̄ ſufficien̄ in lege exiſtunt tam ad manutenend̄ & p̄band̄ exit̄ p̄ed̄ p̄o parte dicti A. F. ſuperius ad̄ patriam junct̄ quam ad excludend̄ Domin̄ Regem de aliqua forisfactura bonor̄ p̄ed̄ habend̄. Ad quas p̄ed̄ Attorn̄ Domini Regis p̄o ipſo Domino Rege minus ſufficienter reſpondit nec aliquod p̄o ipſo Rege allegavit, unde idem A. pet. Judicium ac quod p̄ed̄ bona in dicta informatione ſp̄ec̄ ei reliberentur quodque ipſe quoad p̄miſſa ab hac Curia dimittatur. Ideo ad judicium.

Note, In this Caſe, the Agreement according to the Statute, was put in Iſſue generally, and yet the ſpecial Agreement maintained the Iſſue.

Regula. And wheresoever the Evidence doth not warrant, prove and maintain the very same thing that is in Issue, that Evidence is defective, and may be demurred upon.

Non est factum. Upon Non est factum to a Bond dated at York: It was said in this Case, that to prove the Bond made in another place, doth not prove the Bond nor warrant the Issue, because the delivery is intended to be where the Date is; but the Witnesses cannot prove the contrary, and so the Issue is not proved. But surely if this be found, the Plaintiff shall have Judgment as well as upon a Bond delivered before the date. 31 H. 6. Plo. 7. Rolls 677. But infancy or made by Dures, cannot be given in Evidence upon non est factum, Lib. 5. Whelpdale's Case, 119. because thereby the Bond is not void but only voidable: otherwise of the Bond of a Feme Covert, or Monk, for there the Bond is void, and so Non est factum; and so of a Bond made to a Feme Covert, and the Husband disagree to it, or by Husband and Feme, Non est factum of the Wife.

Release. In An Assise if the Tenant plead, Nul tort, Nul disseisin, he cannot give in Evidence a Release after the Disseisin; but a Release before the Disseisin he may, for then there is no Disseisin upon the matter.

Warranty. In a Writ of Right, if the Tenant joyn the Mise upon the meer Right, he cannot give in Evidence a Collateral Warranty, for he hath not any right by it, and therefore it ought to have been pleaded. 1 Inst. 283.

Re-

Regularly, whatsoever is done by force of a Warrant or Authority, ought to be pleaded. Regula.

But Note, In all Cases where one cannot have advantage of the special matter, by way of Plea, there he may have advantage of it in Evidence; as for Example, the Rule of Law is, That one cannot justifie the Death or killing of a Man; and therefore if one kill another in his own defence, he cannot plead this specially; but he may give this in Evidence: and so in defence of his House against Thieves and Robbers, &c.

By the Statute 23 H. 8. Cap. 5. any thing done by the Authority of the Commission of Sewers, may be given in Evidence upon the general Issue. Sewers.

After taking the General Issue, the Defendant cannot give in Evidence any thing that goes in discharge of the Action; as in Debt upon Nil Debet, he cannot give in Evidence a Release, nor a Grant to cut Trees, to repair upon nul waste fait, nor making of a Ditch to amend the Meadow; but that he only lopped the Trees, he may, if waste be assigned in succidendo Arbores, &c. Neither if a Statute was made that all Tenants for Life should be dispunishable of waste, could he give in Evidence this Statute, 28 H. 8. Dyer 28. for the Discharge ought to be pleaded, because it admits a cause of Action without it. Regula. Release. Waste. Statute.

In Debt against Executors, and Assets Inter manus, in Issue, 'tis good Evidence that they sold Land, by the Will of the Testator, &c. and that they had the Mony paid, so that they recovered Damages in Trespass Assets.

for

for Goods taken in the Life of the Teſtator, &c. 3 H. 6. 3.

Villenage. In an Iſſue upon Villenage regardant to a Manor, a Villain in groſs is no Evidence. Dyer 48.

Attornment. In waſt by the Grantée of a Reverſion, by Montague and Fitz. the Leſſée may plead that he in Reverſion ne granta pas per le fait, and give in Evidence, that he never attorned, or he may Traverſe the Attornment at his election, Dyer 31.

Treſpaſs. In Treſpaſs, Quare clauſum fregit, the Defendant ſays, that locus in quo, &c. is 6 Acres in D. which is his Freehold: the Plaintiff replies, that it is his Freehold and not the Defendants; the Defendant cannot give in Evidence, other 6 Acres in D. which are his Freehold, becauſe the Plea ſhall be intended to refer to the 6 Acres of the Plaintiffs, Dyer 23.

Reſcous. In Reſcous by the Lord, upon Not Guilty, the Defendant ſhall not give in Evidence, That he doth not hold; by Vavaſour and Bryan: and ſo if he ſaid nothing is behind in

Avowry. Avowry, he ſhall not give in Evidence that he doth not hold of him. T. 9 H. 7. 3.

Feoffment. In Aſſiſe, Feoffment pleaded, the Plaintiff ſaid, he did not enfeoff modo & forma upon the Deed and Letter of Attorny to Infeoff upon condition found, if the Attorny made it without condition, this well proves the Iſſue for the Plaintiff. 13 E. 4. 4.

If one plead a Feoffment Joyument with his Companion, or of a Feme Covert, the other may ſay ne enfeoffa pas, and give the matter in Evidence, and the Court ſhall inſtruct the Jury of the Law. 18 E. 4. 29.

Upon

Upon the general Iſſue, any thing may be given in Evidence, which proves the Plaintiff had no cauſe of Action. Regula.

Treſpaſs by the Warden of the Fleet, upon Not Guilty, you may give in Evidence, that he is not Warden, 4 E. 4. 7. Treſpaſs.

So in Treſpaſs of a Houſe, that he had no Houſe there, or the Freehold of another, and not of the Plaintiff, is good Evidence upon Not Guilty: but in Treſpaſs of Goods, 'tis no good Plea to ſay, the property was in another, although it is in a Replevin; and therefore it ſeems to be no good Evidence in Treſpaſs, becauſe poſſeſſion maintains the Action againſt all but the Owner; but that the property was in a Stranger, and he gave them to the Defendant, is good. See before Cap. Evidence, 27 H. 8. 25. But in Trover that they were not the Goods of the Plaintiff is good Evidence. 5 H. 7. 3. Trover.

Ceſſavit and Count, that of divers Lands held by entire Service, upon non tenuit modo & forma, held by ſeveral ſervices, is good Evidence, for he had no ſuch cauſe of Action, 10 H. 7. 24. Ceſſavit.

Upon the general Iſſue, for the Defendant by Evidence to convey to himſelf the ſame Intereſt and Title, is good Evidence. Regula.

As in Treſpaſs of Goſhawks, Not Guilty, and Evidence, that he had a Leaſe of that Wood for years where they were taken, is good, for it is his Title. Treſpaſs.

Account of Receipt, by the hands of J. S. the Defendant pleads ne unques ſon Receiver, and Evidence that J. S. gave this to him, is good Account.

good, 2 H. 4. 13. So in Trelpals a Leaſe for years, Tenancy at ſufferance (but not at Will,) that they were a Strangers Goods, who gave them to the Defendant, is good Evidence, upon Not Guilty. 22 Aſſ. 73. becauſe by theſe matters he makes himſelf a Title, & ſic de cæteris.

Regula.

Upon the general Iſſue, if by the Evidence the Defendant acknowledge that he did the wrong, and juſtifie this, and gives matter that goes to diſcharge him of the Act by juſtification, this Evidence is not good, but he ought to have pleaded it.

This Rule is demonſtrated by thoſe Caſes where upon Not Guilty, in Treſpals, the Defendant would ſay the Property was in a Stranger, and that by his commandment, or his Servant, he took the Goods. Not Guilty, and that he did the Battery ſe defendendo. Not Guilty in maintenance, and lawful maintenance. Inſufficiency of Pounds. The Freehold of a Stranger, and his Licence. A former Recovery in another Action. So for Common, Rent-ſervice, Rent-charge, Licence, &c. cannot be given in Evidence upon the general Iſſue; for theſe matters in Evidence are Juſtifications, which go in diſcharge of the Party, but not by Title, but by juſtification.

So where an Impriſonment or Entry is given by authority of Law, or by authority from any Party, as for an Impriſonment, by the Statute of Treſpaſſers in Parks, putting a Man off his Ground, thruſting a Man out of Church that troubles the Congregation in Service, parting an Affray, and keeping

ing

ing the quarrellers apart, in defence of himself or his. Entry in perambulation. Entry to amend his Gutter leading to his House, as of ancient time had been used. That it was a Common Inn. That he put in his Cattel by the Plaintiffs agreement. That he entred and took the Emblements after the death of the Tenant for Life. That the Plaintiff owed him Mony, and by his invitation he went into his House to receive it. That he took the Goods as a Harriot, Waif, Estray, or Wreck. Or the Plaintiff took away the Defendants Cattel and he entred into the Close where they were, and took them again. That he took the Cattel damage feasant in his Ground, or for an Amercement in a Leet, &c. That the Gods were the Goods of J. S. who delivered them to the Plaintiff to keep, and J. S. commanded the Defendant to take them; or excuse it, that the Plaintiff delivered them to him. That he took them by a Writ. That as Schoolmaster he gave moderate Correction. These are excuses and justifications without Title, and therefore must be pleaded and cannot be given in Evidence upon Not Guilty.

So in an Action de malefactoribus in parcis, he cannot plead Not Guilty, and give a Licence in Evidence. So in an Appeal, if he plead Not Guilty, and shews that he was Sheriff, and executed his Office, or that he was Forester, and killed him because he fled, and would not submit. Vide 12 H. 8. f. 1. The best Case of this matter.

Evi-

Regula. Evidence which is contrary to that in Iſſue, or which is not agreeable to the matter in Iſſue, is not good.

As appears by ſeveral Caſes, which you may find in the Chapter of Evidence. As upon the Iſſue, nothing paſſes by the Deed; you cannot give in Evidence, that it is not your Deed, for this is contrary to the Iſſue, and to that which is acknowledged in the Plea by implication. 5 H. 4. f. 2.

And ſo upon Not Guilty, in Aſſault and Battery, and Evidence that it was done in his own defence, is not good.

And ſo in Debt upon a Bail-Bond, you muſt plead, That there is not the Name of Sheriff in it, Et iſſint nient ſon fait, and cannot give in Evidence upon non eſt factum, for it is contrariant, 5 E. 4, 5.

So upon Iſſue of Common appendant, Common pur cauſe de vicinage, is not agréable to the matter in Iſſue, and therefore cannot be given in Evidence, 13 H. 7. 13.

Regula. Where the Evidence proves the Effect and ſubſtance of the Iſſue, it is good.

As to prove a Grant or Leaſe pleaded ſimplement, a Grant or Leaſe upon condition, and the condition executed, is good, for this proves the effect and ſubſtance of the Iſſue, 14 H. 8. 20. So a promiſe to the Wife, and the Husbands Agréement proves a promiſe to the Husband, and this you may ſée in many Caſes, in the Chapter Evidence.

Other Caſes of Evidence.

Treſpaſs. In Treſpaſs for Goods taken, the Defendant, upon Not Guilty, in mitigation of Damages, may give in Evidence, That the

the Plaintiff had his Goods again, 11 H. 4. 24. 19 H. 6. 34.

Justifiable maintenance cannot be given in Evidence upon the general Issue, but must be pleaded. The Master may justifie for his Servant. Any Man for his Kindred, &c. or to give Money to the Poor, &c. But that he was of his Counsel, may be given in Evidence upon the general Issue, for to give Councel, is not maintenance. 22 H. 6. 35. 28 H. 8. 6. Maintenance.

Upon this Issue, the Defendant may give in Evidence, that he is a Lay-Man not lettered, and that it was read to him in another form, 15 E. 4. 18. but it is the best way to plead it, for the understanding of the Jury. 39 H. 6. 9. Bro. Waiver 2. *Non est factum.*

In an Issue upon a prescription Traversed, the Plaintiff gave in Evidence a Deed bearing date after the time of limitation, scil. after the time of R. 1. And the Defendant would have demurred in Law upon it, and well he might per Cur. Whereupon the Plaintiff would not give this in Evidence, but gave other Evidence 34 H. 6. 37. See Chapter Evidence, where a Grant shall be taken as a confirmation of a Prescription. A Witness may prove the contents of a Deed or Will. *Vaughans* Rep. 77. Prescription.

Note, The Opinion, 12 H. 4. 21. That a Deed made before the time of memory, may be given in Evidence, although it cannot be pleaded. Antient Deeds.

Upon Not Guilty, the Defendant gave in Evidence, That by the Plaintiffs Agreement he carried him from D. to S. and held good, because, what is done by the Plaintiffs Agreement, is no Imprisonment. 14 H. 6. 2. False Imprisonment.

Upon

Upon Not Guilty, the Defendant ſaid, his Maſter locked the Plaintiff into a Chamber of his Houſe, and gave the Defendant, being his Servant, the Key to keep. 22 E. 4. 45.

Sow pigged, being taken in Diſtreſs.

Vide Repl. in Fitz. 34. Repl. of a Sow and Piggs, the Defendant juſtified for the Sow; and to the Piggs, pleaded he did not take them; the Jury found, that the Sow was was with Pigg, when ſhe was taken, and after caſt her Piggs, in the Cuſtody of the Defendant; and the Plaintiff recovered Damages: for ſays Bro. Abridg. Tit. general Iſſue, 88. This is a ſpecial taking in Law.

Dower.

Dower of Rent. Hill. ne unque ſeiſie que Dower la &c. Horton J. S. granted the Rent to the Husband, payable at Michaelmas next, and the Husband dyed before the day, and ſo he was ſeized in Law, and demanded Judgment. Thirn. You ſhall ſay generally, quod ſeiſie que Dower la &c, and give your Caſe in Evidence, Et ſic bene, notwithſtanding the doubt of the lay Gens, for they ought to credit the Law, and Evidence is not to be pleaded. 11 H. 4. 88.

Emblements. *Knivets* Caſe. *Lib.* 5. 85.

Tenant for Life, Leaſeth for years, who is ouſted, and the Tenant for Life is diſſeiſed: The diſſeiſor leaſeth for years, who ſows the Land; the Tenant for Life dies; he in remainder in Fée brings Treſpaſs againſt the Defendants claiming the Emblements by the Leſſee of the Diſſeiſor. Adjudged, that they had not the méer right, but in reſpect of their poſſeſſion, they ſhould bar the Plaintiff, who had no right; and that the méer

meer right was in the Leſſée of the Tenant for Life, and that he might bring Treſpaſs againſt the Leſſée of the Diſſeiſor, and recover all the mean profits. But as to the Entry into the Land to take the Emblements, this was good matter of juſtification; but in regard it was not pleaded, it could not be given in Evidence upon Not Guilty; and therefore the Plaintiff had Judgment for the Entry, and was barred for the reſidue. Note, that the Leſſee of Tenant for Life had right to the Land, and by conſequence to the Emblements, as things annexed to the Land, and the death of the Tenant for Life determines his Intereſt to the Land, but his right to the Emblements remains.

It ſufficeth to prove the ſubſtance, without any preciſe regard to the Circumſtance. As if an Indictment be, That with a Dagger the Offender gave another a mortal Wound, &c. And in Evidence it proved to be done with a Sword, Rapier, Club, Bill, or any other Weapon, the Offender upon this Evidence ought to be found Guilty; for the Mortal Wound is the ſubſtance, and the manner of the Weapon is but the circumſtance; yet ſome Weapon ought to be mentioned in the Indictment. And ſo if A. B. and C. be Indicted for Killing of J. S. and that A. ſtroke and the other were abettors; to prove that B. ſtroke is ſufficient, &c. Regula. Subſtance. Circumſtance.

Manſlaughter upon an Indictment muſt be found, if proved, becauſe the killing is ſubſtance, upon which Judgment ſhall be given.

Indictments for Murther of Ministers of Justice, in execution of their Office, may be general, viz. That the Prisoners felonice, voluntarie & ex malitia sua præcognitata, &c. percusserunt, &c. without alledging the special matter which may be given in Evidence, for the Law implies Malice prepensed. So if a Thief in robbing kills the Man that resists him, or a Man is killed without any provocation, or without malice prepensed that can be actually proved, the Law adjudges this Murder, and implies the Malice; and in these Cases, the Offenders may be Indicted generally, That they killed of Malice prepence, for the Malice implied by Law, given in Evidence, is sufficient to maintain the general Indictment. Lib. 9. 67. Mackalley's Case.

So of an Indictment as accessary to two to prove accessary to one, is sufficient, Lib. 9. 119.

In Cromwel's Case, Lib. 4. 12. Although it was objected that in an Action of slander, If the Defendant will justifie, he must justifie the same words and in the same sense, as is laid in the Nar. or else he must plead, Not Guilty, and give the special matter, that is the variance in Evidence. Yet the Court held, That the Defendant should not be put to the general Issue, but might justifie, although he varied from the Plaintiff in the sense and quality of the words: and might set forth the coherent words. As for calling the Plaintiff Murderer, the Defendant may shew that they were speaking of Hares, and the words were spoken in reference to killing of Hares.

Upon

Radcliffe Trustees

Upon the Iſſue, if the Lord of the Manor granted the Lands, per copiam rotulorum Curiæ manerii præd. ſecundum conſuetudinem manerii præd. To prove that there were cuſtomary Lands in the Manor, and that the Lord of late granted the Land, &c. Per. Copiam Ro-rotul. Curiæ, where it was never granted by Copy before, is no good Evidence to find the Cuſtom, or that the Lands, &c. were grantable or demiſeable by Cuſtom. Leon. 55. Kemp and Carters Caſe.

Copyhold. In *Pilkintons* Caſe. *Stilts* 450. *Rolls* ſaid, If Copies of Court Roll be ſhewed to prove a Cuſtomary Eſtate, the enjoyment of ſuch Eſtates muſt alſo be proved, otherwiſe the Proof is not good.

Forger of a Deed, in which is contained a demiſe of the ſite of the Manor of R. and terras dominicales, &c. A Deed of the ſite, and all the Demeſnes of the ſaid Manor, exceptis duabus clauſuris, &c. is good Evidence, for it is not neceſſary to conſtrue terras dominicales, &c. omnes terras dominicales, &c. for Lands not accepted are terræ dominicales, and ſo the Court is ſatisfied by that Evidence, Leon. 139. Atkins and Hales Caſe.

Forger. *Totum & pars.*

Debt againſt an Executor, upon plene adminiſtravit, it appeared that the Executor medled and adminiſtred, and then refuſed in Court, and adminiſtration was granted to another; and that ſeveral Sums were recovered againſt the Adminiſtrator; it was ſaid by Periam Juſtice, 1. That if an Adminiſtrator (who is a Stranger) adminiſter, without the commandment of the Executor, the Executor cannot give ſuch adminiſtratiſtration in Evidence to prove his Iſſue. 2. That in the principal Caſe, the Executor having adminiſtred he could not refuſe, and ſo the adminiſtration is granted without cauſe, and what he did was without warrant,

Plene Adminiſtravit.

Upon *Plene adminiſtravit* a Rejoinder may be given in Evidence.

and no administration. Leon. 134. Hawkins and Lawse Case. At Bury Assises, 1682. before Judge Windham, The Executor gave the administration of the Administrator in Evidence, and allowed; but there, what the Administrator did, was by the Executors consent. In Mr. Lun and his Mothers Case.

Plene administravit. An Executor pleads *plene administravit præter* a Judgment, Replication, and Issue, that the Judgment was fraudulent.

An Executor de son tort cannot give in Evidence his retaining of Goods to pay himself, for he cannot retain; but if he take out Letters of Administration (although) Pendente lite, he may retain for a Debt of as high a nature, and plead this in Bar, for the administration purges his wrong, and although he shall not abate the Writ by taking out Letters of administration, yet he may plead this in Bar. Stiles Reports, 338.

The Obligee who had the Judgment, was denied to have Evidence about his Debt, for he sweareth to have Assets for himself, and is Interested in the thing. Before Judge *Windham*, at *Bedford* Assises, 1682.

No Evidence to be given against what is admitted upon the Record.

In a Replevin, the taking was supposed in R. The Defendant said that the place where, is forty Acres, parcel of the Manor of R. which is his Freehold, and avowed for Damage feasant; The Plaintiff said, that the place where, is parcel of the Manor of R. in R. and conveyed title to himself in that; Absque hoc, that the Manor of R. unde, was the Freehold of the Defendant. It was the Opinion of the Justices, that the Plaintiff is estopped to give Evidence that Defendant had not any Manor of R. for the words

words absque hoc and unde imply he had such a Manor, but he ought to have taken it by protestation, that the Defendant had no such Manor of R. in R. absque hoc, that the forty Acres was the Freehold of the Defendant, Dyer 183.

Trespas, concerning the Rectory of Norton Pinckney, which belongs to Oriel Colledge in Oxford. The Issue was, if there was a Vicaridge indowed there, or only a stipendary Curate.

Note, *Leon.* 3. *part* 210. If the Parties admit a thing *per nient dedire*, the Jury is not bound by it; but where upon the pleading a special matter is confessed, the Jury shall be bound by it. Impropriation.

1. All agreed, that if a Vicaridge be erected and established, if there was no Endowment de facto of the Vicaridge, the Vicar could not claim any thing.

2. There was shewed an Impropriation by the Licence of the Pope, made in the time of E. 2. Dodridge said, that was not good. Jones, e contra. And it will be perilous to such ancient Impropriations, if now the consent of the King must be shewed; and at that time it was taken good by the assent of the Pope without the King. Dodderidge denyed that the Pope without the King at that time could make an Impropriation with the Ordinary and Patron. But Crew agreed with Jones. And in things of such antiquity omnia præsumuntur solempniter acta, and said that so it was ruled in a Case before: And Jones said, it was nothing to the Vicar, for the Vicaridge may be endowed without the consent of the King, and 'tis not Mortmain. Palmers Reports 427. Erasmus Copes Case against Bedford.

Hors de son fee. Where hors de son fee is pleaded, a releale of the Seigniory, is good Evidence. 8 E. 2. 26½.

Debt for Rent. In Debt for Rent upon a Leale for years, The Iſſue being joyned, if the Rent was paid or not, the Defendant gave in Evidence for part of the Rent, That the Plaintiff was by Covenant to repair the Houſe, and did it not, and thereupon he expended the Rent in repairing the Houſe, and the Queſtion was, if this Evidence will maintain the Iſſue. Gaudy conceived it did, for the Law giveth this liberty to the Leſſee to expend the Rent in reparations, and recoup the Rent, V. 12 H. 8. 1 Fitz. Tit. Bar. 242. 14 H. 4. 27. Fenner, It is no Evidence, for if the Leſſor will not repair it, the Leſſee may have his Covenant againſt him. Clench, ſeemed he might well expend the Rent in reparations, but he ought to have pleaded it, and cannot give it in Evidence upon the general Iſſue, and thereupon they moved the Jury to find the ſpecial matter.

So that it ſeemed to the Juſtices, That the Defendant had liberty to expend the Rent in the reparations (they being to be done at the Plaintiffs Coſt) but then that he ought to have pleaded this matter, as it was done in (almoſt) the like Caſe. Fitz. Tit. Bar. 242. Yet why might he not give it in Evidence upon the general Iſſue? for if the Law allows this to amount to a payment of the Rent, then the Defendant ows nothing, which maintains nil debet, and I think the other Book of 14 H. 4. 27, rejects this ſort of ſpecial Plea, upon this reaſon, that the

Plea

Plea amounted to a general Issue: but there indeed the Rent was pleaded to be laid out at the Plaintiffs command, here only by authority in Law. I should be glad if any one would reconcile these two Books better. I know there is another reason in the Book (and assigned by Rolls in his Abridgment of the Case) why the Plea was rejected, viz. That the duty was acknowledged by the Plea, and therefore the matter of the Plea not good, without shewing a Deed of it; but I should have been better pleased with him, if he had assigned the other reason, viz. That it amounted to the general Issue. Which made Cheyne that he durst not joyn in Demurrer. For 'tis not pretended in either Case, that the Deed ordered the Rent to be laid out in the repairs.

And in that Case in F. where there was no express Order of the Plaintiff; it may be the Judges allowed the special matter to be pleaded, because the Jury should not be entrusted with the Law upon the general Issue, which may be said for the special pleading this matter in our Case, although it may amount to the general Issue.

But as to the residue, the Defendant shewed, he paid it to others, by the Plaintiffs Order, which was held clearly good, for what is paid by the Lessors appointment, is a payment to himself. Cro. Eliz. 223. Taylor against Beal. Vide Rolls Tit. Debt 605. 34 H. 6. 17. Bro. Debt 27. Reparations. *Vide* the Cases of *Recouper. Lib.* 5. 30.

Where a Man is Estopped in pleading to speak against his own Deed, yet he shall not in Evidence; as in Isehams Case against Estoppel.

Morris. Cro. 4 Car. 109. Upon Evidence at Bar, It was held by all the Justices of the Common-Pleas, That where one makes a Leale for years of Land by Indenture, and hath nothing in the Land, and afterwards purchaseth the Land and aliens it; although it be a good Leale for Years by Estoppel against him and his Alienee, by way of pleading, and shall bind them, yet it shall not bind the Jury, but they may find the truth, and if they find the truth, the Court shall adjudge it to be a void Leale. Vide tamen Rawlin's Case, Lib. 4. 53. Sutton and Dicken's Case, Leon. 1 Part, f. 206. 1 Inst. 47. 227. Edwards against Omellhallum. Marsh. 64. James and Landon's Case, Cro. 27. Eliz. f. 36. Leon. 3 part, 210. Bulst. 2 part, 41.

Demurrer. Note, That if a Demurrer be made upon the Evidence, the Evidence ought to be entred verbatim. Kelway 77. Where in Account, against one generally as Bayliff, the Evidence that charged him specially by reason of his Tenure to collect, &c. was upon Demurrer held not good.

Surplusage. Matter of surplusage shewed in Evidence shall not hurt. Keilway 166.

Will. Issue was upon a devise to A. Harding and her Heirs, modo & forma, and the Will given in Evidence was, A. H. shall have all my Inheritance, if the Law will allow it, and held sufficient to maintain the Issue, Hob. 2.

Account. So upon Ne unques receiver per maines J. S. a delivery from J. D. by the appointment of J. S. to the Plaintiffs use, is good Evidence. Hob. 36.

Issue

Iſſue whether A. was taken by a Capias ad ſat. at the Suit of B. and Evidence of a taking at the ſuit of C. and then a delivery of a Capias ad ſat. at the Suit of B. to the Sheriff, is good. Hob. 55. But a taking upon a Capias utlagat. or Capias pro fine, with a prayer of the Plaintiff, that he may remain for his ſatisfaction, is not. Ibid. Arreſt.

In a Conſimili caſu, where the demandant counts of an alienation in Fée, yet the Defendant ſhall make his Traverſe to the alienation, modo & forma, and then the demandant ſhall maintain the Iſſue, by an Alienation in Fée, or in Tayl, or for Life, for they are all alike material. Hob. 105. *Conſimili caſu.* Subſtance.

In an Aſſiſe the Defendant pleaded the Déed of the Brother of the Plaintiff, with Warranty, a Déed of the Father with Warranty, will not maintain the Defendants Iſſue. Hob. 55. Warranty.

In Bennet's Caſe, Stiles 223. In a Tryal at Bar, It was ſaid by the Court, That if either of the Parties to a Tryal deſire that a Juror may give Evidence of ſome things of his own knowledge to the reſt of the Jurors, that the Court will examine him openly in Court upon his Oath, and he ought not to be examined in private by his Companions. And it was alſo ſaid, That if a Robbery be done in Crepuſculo, the Hundred ſhall not be charged; but if it be done by clear day-light, whether it be before Sun riſe, or after Sun ſet, it is all one, and the Hundred ſhall be charged. Juror. Robbery.

In

Demurrer upon Evidence.

In an Action on the Case, for digging a Hole in the High-way, into which his Gelding fell, &c. Upon Not Guilty, this Evidence was given, That the Plaintiffs Servant was driving the Plaintiffs Gelding in the way, and that by reason of the hole he fell, &c. Upon which it was demurred, because it was not proved that there was such a High-way, nor who digged the hole. Roll Chief Justice, This Evidence is no more than a special Verdict, and it ought to find the way and the Hole digged, and all the matter conducing to the Issue, and therefore it is not good as it is, and a Venire de novo was awarded. Stiles 335.

Action sur Case.

Demurrer upon Evidence.

In Trover and Conversion, there was a Demurrer joyned upon the Evidence, and thereupon the Court directed the Jury to find Damages for the Plaintiff, if upon the argument of the Demurrer, the Law should be adjudged for him, and then the Parties desired the Jury might be discharged, and referred the matter to the Judges, to determine the Law upon the Evidence. In this Case Roll Justice took this difference: If a Record be pleaded, it must be sub pede sigilli, or else the Judges cannot judge of it, but it may be given in Evidence, and the Jury may find it, though it be not sub pede sigilli. And the Court advised the Parties for their own expedition to let a venire facias de novo be issued out, and to wave the Demurrer upon the Evidence, because it was not good, nor could not bring the matter in question before them, that they might determine it; for one Party saith there is a Writ, and the other saith

Record.

saith there is not a Writ, which is bare matter of Fact for the Jury to determine, and not for the Court, and the Demurrer ought to have been, whether the Writ be good or bad, and should have admitted that there was a Writ tiel quel; and then had the whole matter come legally before the Court, to wit, whether the Evidence given to the Jury be sufficient for them to find a Verdict for the Plaintiff, upon the Issue joyned or not. For the matter of fact ought to be agreed in a Demurrer to an Evidence, otherwise the Court cannot proceed upon the Demurrer. And he said, if a Deed be pleaded, the Party must shew it in Court; but in Evidence, 'tis not absolutely necessary to shew it, if it can otherwise be proved to the Jury, and so it is of a Record: and concluded, that the Demurrer was not good, and that there ought to be a Venire facias de novo to try the matter again. Bacon Justice said, there ought not to be a Venire facias de novo, but that Judgment ought to be given against one Party, to wit, the Defendant, for ill joyning in the Demurrer, to the intent the Party that is not in fault may be dismissed; and the Parties here have waved the Tryal per pais, by joyning in the Demurrer. But Roll answered, That no Judgment at all could be given, for both parties be in fault, one by tendring the Demurrer, and the other by joyning in it, and the Defendant might have chosen whether he would have joyned or not, but might have prayed the Judgment of the Court, whether he ought to joyn. The Court advised to search Precedents, for a Venire facias

Deed.

Record.

cias de novo after a Demurrer upon an Evidence, and if there be any, they hold that the same Jury ought to come again, and not another. Roll said, if a special Verdict be found insufficient, a new Venire facias ought to Issue, and he saw no difference between that and this Case. Wright and Pindar's Case, Stiles 22. and 34.

Debt. Servants Wages.

In Debt for Servants Wages, viz. 20 s. or a Robe yearly: the Defendant may plead payment of the Robe, and shall not be put to the general Issue, where the payment is of another thing than Mony; but of Mony he must plead nil debet, and give the payment in Evidence. And the Defendant may plead that the Plaintiff departed out of his Service, and shall not be forced to the general Issue, 9 E. 4. 36. Though surely that may be given in Evidence upon Nil debet, for the Plaintiff must prove he served: so indebitatus Assumpsit & non Assumpsit, upon the promise in Law, an Extinguishment by taking a Bond (being a matter of a higher nature) for the Debt may be given in Evidence.

Extinguishment.

And Note, if an Infant buy Goods, and afterwards give a Bond, and this Bond be avoided by Infancy, yet it seems the Contract shall not be revived. Sed dubitatur, Rolls Tit. Extinguishment 604. For now, this Bond which was voidable, is become void, and a void thing shall not have such effect: But a personal Action once suspended is gone for ever; but acceptance of a Bond shall not extinguish Rent, nor arrearages of an Account, before an Auditor of Record, because these are of a higher nature than the Bond

Bond, the Rent being real, and the other of Record. But the Bond extinguishes the Contract for the Arrearages upon an Insimul computassent, &c.

Acceptance of Rent due the last day, and an Acquittance thereof, discharges all the arrearages due before. Lib. 3. 65. Unity of possession in as high an Estate destroys the prescription, &c. Acceptance. Rent.

A seisure and condemnation in the Exchequer of forfeited Goods, may be given in Evidence upon Not Guilty in Trover, but it must be pleaded in Trespas. In Trover of a Horse, that he is a Common Hostler, and that the Horse was put to him at Livery and dyed, is good upon Not Guilty. Roll 1 part, 22. Trover. Trespass. *Vide Rolls* 1 part, 1, 2. A custom pleaded in Trover to take Corn to repair a Bridge; and *Cro. Eliz.* 433, and 262.

Upon Assumpsit, the Plaintiff declares upon two considerations, and a simple promise: If the Jury find but one, or a conditional promise, this doth not maintain the Issue for the Plaintiff. Leon. 173. Musted and Hopper's Case. Promise

Where the Issue is not perfect, no Evidence can be applied, neither can the Justices of Nisi prius proceed to the Tryal of such an Issue. As whether the Mony was paid after the date of the Obligation, and the date was left out and did not appear in the Record. Brown 2. 47. Imperfect Issue.

In Debt upon a Bond, conditioned to pay 20 s. at the House of the Defendant, the 7th day of May, upon payment at the time and place. The Jury found the payment before the seventh day, and prayed the advice of the Court, if this was a payment Payment.

at

at the day. The Court adjudged that the payment and acceptance before the day, was as well as if it had been paid at the day. Savile's Reports 96. Bond against Richardson. And so says Cook 1 Institutes 212. The time and place are but circumstances, and if the Obligee or Feoffee receive the Mony at another place, or before the day, it is sufficient: or a lesser sum before the day. But More 47. Upon Issue of payment at the day and place, and Evidence of payment a Month before, and Demurrer upon the Evidence. Dyer, Brown and Welsh, said this Evidence doth not maintain the Issue, because before the day of payment there is no duty, and the day and place are parcel of the Issue, and the Act on one day is not an Act done on another day: As if an Executor pleads payment at the day, 'tis not good Evidence to shew that it was paid before the day by the Testator, for this doth not prove the Issue, and yet there was not any duty remaining at the day, and therefore the Pleading ought to have been specially according to the truth. Vide devant 198. And 'tis not like the Case, where the circumstances of time and place are put only for necessity of Tryal; but in regard that payment is the substance, why is it not sufficient to prove, as well as to find, the effect and substance of the Issue? And 'tis not like the Case of collateral Conditions, where the condition is not to pay Mony, but to do some collateral thing, as to deliver a Horse, a Robe or Ring, &c. or to pay Mony to a Stranger, such collatteral Conditions are more strictly to be observ'd. Vid. 1 Inst. 212.

Note,

Note, If there be a Demurrer, yet there may be a Plea, puis darrein continuance; and if the Plaintiff take Iſſue, or demur to this Plea, yet the Court muſt alſo conſider of the firſt Demurrer; for if upon that ſtanding confeſſed by the Demurrer, the Plaintiff could not have his Action, the Court cannot give Judgment for him, howſoever the latter Iſſue or Demurrer paſs. But otherwiſe if the firſt had been an Iſſue, for then nothing were confeſſed to his prejudice, and then that had been utterly relinquiſhed by a ſecond Iſſue, or Demurrer, Hob. 81. With a Query, &c. When this Plea is pleaded, the Juſtices of Niſi prius cannot proceed to take the Inqueſt, neither can the Plaintiff reply there, but in Bank. Bulſtr. 92, 93. *Pleas puis darrein continuance.*

Per Dodridge, In Trover and Converſion of Goods, if the Defendant derive a Title from a Stranger, this amounts to the general Iſſue, otherwiſe if from the Plaintiff. Latch 186. And baylment of the Goods to deliver to another, and delivery accordingly amounts to the general Iſſue, and may be given in Evidence upon it. Bulſtr. 3 part, 209. Trover.

In Treſpaſs againſt two, for entring into the Plaintiffs Land, if one pleads his Freehold, and the other that he entred by the commandment of him that pleads it is his Freehold, here is to be but one Iſſue joyned, viz. by him that claims the Intereſt, for upon that Iſſue all depends: If it be found againſt him, his Servant has no colour. Treſpaſs. Freehold.

And

Averments.

And in regard what may be averred, may be proved and given in Evidence, 'twill not be impertinent to draw a short Scheme of Averments, with which I will conclude.

Averment had upon or against a Deed.

To alter, qualifie, or abridge the operation of it, if there be any apt words in the Deed, whereupon to ground it. As a Grant to A. the Son of B. and he hath two Sons of that name, of the Manor of S. and he hath two Manors of that name, which Son or Manor was intended may be averred. And so may a

Consideration.

consideration of a Deed that is besides, but not that is against the express consideration of the Deed, nor can any thing against the words of the Deed, either inlarge or restrain it.

Uses.

Nor can a Use against or besides the express Uses in the Deed; but where no Use is expressed, or incertainly expressed, it may; and also to reconcile a Fine, and the Indentures to lead the Uses of the Fine. Lib. 2. 75.

But when a Deed is utterly incertain, no averment shall help it. As a Grant to one of the Sons of J. S. to two & hæredibus, &c.

Upon or against a Record.

An Estate to a Woman for her Life, may be averred to be made for her Joynture. Dyer 146. Lib. 4. 4. And that the thing granted to me by a new Name is all one thing with that which hath another, or an old Name. Dyer 37. 44.

A thing that is against or besides a Record, or any thing that is within it, shall not be averred; therefore the date of a Recognizance expressed to be taken at Dale cannot be averred to be taken at Sale. But such an averment as may stand with the Record may be admitted. As that the Fine was before

fore the Inrollment (being both in one Term,) the Uses of a Fine or common Recovery may be averred; or what, or who was meant, where there are two of a name, &c. Lib. 8. 155. The Heir in Tayl cannot aver against a Fine levyed by his Ancestors, That Partes finis nihil habuérunt, Lib. 3. 84, 85. Leon. 75, 76, &c. But when Tenant in Tayl accepts of a Fine, and grants and renders the Land by the same Fine, which is executory, there, if no Execution be sued in the Life of Tenant in Tayl, his Issue may aver continuance of Possession, &c. in his Father, for this stands with the Fine, and the acceptance of the Fine alters not the Estate.

A Fine taken by *R. M.* Esq; and returned by *R. M. Militem*, upon the *Ded. p.* the Record not to be averred against in Error. *Yelverton* 33 *Cro.* 2 *part* 11.

If a Man and his Wife sell her Land for Mony, and after levy a Fine to the Vendée and his Heirs, it may be averred it was for Mony, and so carry the Use to the Vendée, without any Declaration of Use, which otherwise would result to the Woman and her Heirs: and so other Uses may be proved, than what are in an Indenture of Uses subsequent to the Conveyance, &c. Lib. 9. 8. 5. 26.

Tenant in Tayl, with remainder in Tayl to A. Reversion in Fée to himself, bargains and sells Land, &c. and levies a Fine to him with Proclamation, with general Warranty. The Conusée infeoffs A.

Resolved the Bargainée had an Estate determinable upon the death of the Tenant in Tayl (and also the Reversion in Fée, which the Bargainor had,) and his Wife shall be endowed, but this determines upon the death of the Tenant in Tail.

Resolved, The Fine doth not discontinue the remainder, for this doth not pass any Estate, but this Estate of the Bargainee is durable,&c. so that it shall not determine,until the Tenant in Tayl dye without Issue: and the conclusion may be confessed and avoided.

Resolved, The Warranty doth not bar the remainder, for this was annexed to the Fee determinable, &c. and to the Reversion in fee, and doth not extend to the remainder, for this was not displaced, and the Feoffee of the Conusee cannot inlarge, &c. 'Tis a Maxim, that a Warranty bars no Freehold, which is in esse, possession or remainder, &c. and not displaced before or at the time of the Warranty, although it be divested before the descent.

Resolved, A Warranty cannot inlarge the Estate.

Resolved, The Feoffment of the Conusee was not a discontinuance of the remainder, because he was not Tenant in Tayl; so of the Grantee of totum statum suum, &c.

Resolved, A Collateral Warranty may be given in Evidence, and found by the Jury.

The Chief Justice held that by the Feoffment of the Conusee, the remainder was not displaced nor put to a right, for his Fee-simple, and his Fee determinate pass, and the Feoffment which in it self is not tortious, cannot be tortious to another. Otherwise it is when Tenant for Life, or remainder in Tayl, &c. makes a Feoffment, for the Feoffment it self is tortious.

Note,

Note, There are some Titles, to which a Warranty doth not extend, as in the Case of an Exchange, condition upon a Mortmain, consent to a Ravisher, &c. for in these Cases no Action lies, in which Voucher or Rebutter may be, neither shall a descent take away Entry in these Cases, and cannot be displaced out of their original essence. Collateral Warranty shall bar Dower, and yet an Action is given for this. But a Fine, &c. and five years bar these Titles and Dower also, if an Action be not brought in time, Seymour's Case. Lib. 10. 96.

Buckler and Harvey's Case, Lib. 2. 55.

Tenant for Life Leases for four years, and afterwards grants the Tenements Hab. from P. for Life, after P. the Lessée attorns, then the Grantée enters and Leases at will, to which Tenant at will the Tenant for Life levies a Fine Come ceo, &c. Rem. in Fée enters.

Resolved, The Grant was void, for an Estate of Freehold cannot commence in futuro, and the Grant being void at the Commencement, the Attornment afterwards cannot make it pass; and that the Grantée was a disseisor. But if the Grant had been good at the Commencement, and was only to have its perfection by a subsequent act; as by Livery upon a Charter of Feoffment, &c. and the Grantée enter before the perfection, he is not a Disseisor, but a Tenant at Will.

Resolved also, If the Fine had been Levied to the Disseisor himself Come ceo, &c. he which had the right of remainder, may enter for the forfeiture, for it was agreed,

that the right of a particular Estate may be forfeited, and entry given to him who had but a right. As if Lessee for years be ousted, or Tenant for Life disseised, and the Lessee for years brings an Assise, or the Lessee for Life a Writ of right, &c. 'tis a forfeiture.

Resolved also, That the fine being levied to the Tenant at will, it is a forfeiture, and he which had the right of remainder may enter, and the Tenants for Life and at will also, shall be estopped to say quod partes finis nihil hab. &c. and of such estoppels which are by matter of Record, and trench to the disherison of them in Reversion, &c. they shall take advantage although they are strangers to the Record, for they are privies in Estate.

Resolved also, If the Disseisee levy a Fine to an Estranger, the Disseisor shall retain for ever; for the Disseisee against his own Fine cannot claim the Land, and the Conusee cannot enter, for the right of the Conusor cannot be transferred to him; but by the Fine the right is extinct, whereof the Disseisor shall have advantage. But in Crok 1. part 482. 13 Car. it was moved, if the Disseisee, not knowing of the Disseisin, levied a Fine to a Stranger, whether that should bar his right, and move to the benefit of the disseisor, according to Buckler's Case; and said, if admitted, would be of very mischievous consequence, and by two Judges held, that it should not enure to the benefit of the Disseisor but to the use of the Conusor himself, for otherwise a Disseisin being secret,

secret, may be the cause of disherison of any one who intends to levy a Fine for his own benefit, for assurance of his Lands upon his Wife and Children, or otherwise. 1 Inst. 277.

Against a Certificate.

Not against such Certificates as are a definitive Tryal of the thing certified, as the Bishops Certificate of Excommunication, Bastardy, lawful Marriage, &c. So Certificates of the Marshal of the Host, which is a Tryal; but against Certificates only of information it may be: as against Certificates upon Commission out of any Court, or of the Commissioners that affirm a Man a Bankrupt, which are not tryable in a course of Law, but Informations. Lib. 7. 14. Lib. 8. 121.

Upon a Return.

So of a return, if it is a definitive Tryal of the thing returned, no averment lyeth against it. As the return of a Sheriff upon some Writs, as a Writ of Partition, Elegit and of Hab. Corp. from a Mayor, &c. But if the return is not definitive, as upon a Rescouse, &c. an averment doth lye, and upon this you may go to Tryal: So if it be a return to indanger a mans Life, or his Inheritance, an averment may be had against it. Dyer 348. 117. So it lyeth against the returns of Bayliffs of Franchises, so that the Lords be not prejudiced in their Franchises thereby. Goldsb. 139, 129. pl. 23.

Upon or against a Will or Administration, it lyeth although they be under Seal of Court.

In Action for a false return, an averment doth lye against the Sheriffs return, Winch 100. and so it doth in any other Action, than in that the return was made.

Any averment may be upon a Will or any part of it that may help to expound it, and of such a thing that may stand with the Will,

and may be collected out of the words. As which Son he meant, &c. Lib. 8. 31, 41. But no averment against or besides that which is expressed in the Will, or which cannot be gathered to be the mind from the words, nor of any thing that doth not cohere with the Will: especially if it be about Lands, as in the Lord Cheyney's Case, Lib. 5. 68. A devise to A. and the Heirs of his Body, the remainder to B. and the Heirs Male of his Body, on condition that he or they or any of them should not alien, &c. no averment shall be taken to prove by Witnesses or other Evidence, that the Devisor intended to include A. within this condition by the words he or they; for the construction of Wills ought to be collected out of the words of the Will in writing, and not by any averment or proof out of it.

Against Court Rolls, or upon them.

It lyes against the Rolls or Records of County Courts, Hundred Courts, Courts Baron. As that there is no such Record, or it is not as it is certified. 34 H. 6. 42. 9 E. 4. 4.

Against common presumption or reason.

No averment or proof is to be admitted against common presumption, as that there was more Rent behind when the acquittance of the last Rent was made. 1 Inst. 373. Nor against common Reason, as that Land doth belong to Land, or to a Messuage. Plo. 170. Lib. 4. 37.

Upon an award.

If the matter contained in an award, and the matter in the submission do not agree, it will hardly be supplied by an averment. Dyer 242. 52.

Date.

If the Defeasance of a Recognizance be dated before the Recognizance, it may be aver-

averred to be delivered at or before the time of the Recognizance entred into. Perkin's Case 147.

Things apparent or necessarily intendable by Law, need not be averred, manifesta non probatione indigent; Quod constat clare, non debet verificari. Lib. 11. 25. Plo. 8.

Chief Justice Anderson held, Godbolt. 131. that if one devise Lands to the Heirs of J. S. and the Clerk writes it to J. S. and his Heirs, that the same may be holpen by averment, because the intent of the Devisor is written, and more, and it shall be naught for that which was against his Will, and good for the residue. But if a Devise be to J. S. and his Heirs, and it is written but to the Heirs of J. S. there an averment shall not make it good to J. S. because it is not in writing, which the Law requires; and so an averment to take away any surplusage is good, but not to increase that which is defective in the Will of the Testator. But with submission, if the Law should admit of such averments, it would be as mischievous one way as the other, and no Man could know by the words of the Will, what construction to make, nor what advice to give, but this shall be controlled by collateral averments out of the Will, and instead of proving the Testators Will, it would be the destroying of it. Devise.

If the partition be by Writ, although it be unequal, yet it shall not be avoided by averment, but shall bind the Feme Coverts. And such averment against the return of the Sheriff shall not be good. 1 Inst. 171. Partition.

Consideration.

A valuable Consideration in a Bargain and Sale not expressed, may be averred. 2 Inst. 672.

A consideration which consists with the Deed, and not repugnant, may be averred, as in a Bargain and Sale, if a particular consideration be expressed, and the general Clause, of other good Causes and Considerations, or without that general Clause, yet other considerations may be shewed: So if the particular Consideration be Love and Affection, yet payment of Mony may be shewed: So a precedent intent of Uses and to levy a Fine may be shewed to guide the Use of the Fine. Rolls Tit. Uses. 790.

Uses.

As if I Covenant by Deed to purchase Land, and then to levy a Fine, or make a Feoffment thereof to the use of another, and afterwards purchase and levy a Fine, or make a Feoffment, this use shall rise; for the Deed is an Evidence of the precedent intent, and the uses of a Fine or Feoffment may be directed by the precedent intent, and yet such intent, is countermandable. But a Covenant to purchase and stand seised of Lands to uses, shall not raise the use after the purchase, because the use is to rise by the Deed, and at the time when the Deed was made, there was no Estate in the Land. Ibid.

So if one joynt-tenant covenant to stand seised of his Companions part, if he survive, yet no use shall rise, if he did survive, because at the time of the Covenant he could not grant nor charge the Land. Ibid.

Fine sur grant & render.

'Tis true that a fine sur grant and render, unless it be in special Cases, cannot be averred

red by Parol to be to any other uſe or intent than what is expreſſed in the Fine, Feoffment, or other Conveyance: But there is a diverſity betwixt a Uſe and Conſideration; for when a Fine, Feoffment, or other Conveyance import an expreſs Conſideration, a Man may aver, by word, another conſideration, which may ſtand with the Conſideration expreſſed; but the Parties cannot by Parol aver any other Uſe than is contained in the ſame Conveyance. Alſo no averment ſhall be againſt the Conſideration expreſſed: But yet in ſome Caſes a Fine Sur Grant & Render, may be ruled and directed in part by averment per parol; and this is when the Original Bargain and Contract betwixt the Parties, is by Indenture or other Deed; as where it is agreed by Indenture, that a Fine ſhall be levied of certain Lands, by the name of a certain number of Acres, to divers perſons, and that they ſhall grant and render the Land again in Fee-ſimple, which ſhall be to certain Uſes, the Fine is levyed of the Land; but there is ſome variance betwixt the number of Acres compriſed in the Fine; or the Fine is levyed to one of the Parties only, who grants and renders the Land, ſo that there is a variance betwixt the Covenant and the Fine, either in the number, time or perſon, &c. Yet this Fine ſhall be averred to be to the Uſes in the Indentures. For the intent of the Parties, and the ſubſtance and effect of their Original Bargain and Agreement, is chiefly to be regarded in all Conveyances, and therefore the Law allows an averment by Parol, to reconcile the Fine and

In-

Indentures, although this sort of Fine imports a Consideration in it self, and regularly by a naked averment by parol, cannot be averred to be to any other use or intent than is compriſed in the Fine it ſelf, but by Deed it may be. Lib. 2. 77.

And although a Fine be of ſo high a nature, that it will not permit naked averments againſt the purport and conuſance of the Fine; yet when the Law requires one of neceſſity, and for conformity to joyn with another in a Fine, the Law permits to ſhew the verity of the matter, to avoid prejudice and confuſion. As where Baron and Feme an Infant levy a Fine, which is reverſed for the Nonage of the Wife, the Baron and Feme ſhall have reſtitution preſently, and the Conuſee ſhall not detain this during the Coverture; for all the Eſtate paſſes from the Feme, and the Baron joyns for neceſſity and conformity, and therefore the Law permits that the verity of this ſhall be ſhewed, and that the whole Eſtate ſhall be reſtored to the Wife during the Life of the Husband. Worſely and his Wife againſt Charnock. 30 and 31 Eliz. Lib. 2. 77.

What may be averred contra & præter Records, Fines, Recoveries Deeds, Wills, &c. is very requiſite for a good Evidencer to be ready in, and therefore I have here given this taſte, referring him to the Books at large, where he may ſee what averments he in remainder, the Heir in Tayl, the Wife, her Heirs, Eſtrangers, Privies, Parties, &c. may have to Fines, Recoveries, &c. Lib. 1. 76. Lib. 2. 77. Lib. 4. 71. Lib. 9. 140, 141.

Lib.

Lib. 2. 55. Lib. 2. 88. Lib. 10. 50, 96. Lib. 3. 51, 88. Lib. 4. 72, 74, &c.

In Assault and Battery, if the Plaintiff prove only the Assault, he shall recover, for an Action of Trespass lyes for an Assault, of an Assault and Battery, Assault and menace, &c. See Rolls Tit. Trespass, 545. F. N. B. 91. a. &c. Assault. Battery.

To lay hands gently upon the shoulders of a Man and say that is He against whom the Justices Warrant is: or to serve him with a Subpœna, proves no Battery.

These things following are good justifications, but cannot be given in Evidence upon the general Issue.

Correction by the Parents, Master, Schoolmistress, Apprehension of a common Cheater at Dice. Molliter manus imposuit, upon one setting a Dog upon him. Beating one by the Husband in defence of his Wife. By the Master in defence of his Servant; or by the Servant in defence of his Master. Holding a Man that cometh to stop the River to his Mill; or to throw down his Booth. Inevitably discharging his Pusket in the Plaintiffs Face at a Muster. Beating one in defence of his possession of his Goods, House, Lands, Goods distrayned, &c. By a Forester, of one who resisted in the Forest. That he imprisoned another to prevent mischief. As the killing of another with whom he was fighting, (not wrangling with words) until the fury be over.

Lunacy will not excuse in Battery, although it will of Felony. Note a Man may justifie an Assault and Battery, but not wounding or maiming of life or member, or mayhelm in defence of the Possession of his Lands or Goods. 2. *Inst.* 316.

An erroneous Process to an Officer out of a Court, having Jurisdiction, in aid of the Bayliffs. That the Executor entred the Plain-

Tenant in common cannot justifie to enter into his Companions Ground to take the Horse they have in Common, although he may take him elsewhere.

Plaintiffs Ground to take the Testators Timber there. That he had a Pilcary, and put Stakes in the soil. Taking his Goods stolen, in the Plaintiffs House, upon fresh pursuit. Entring his Soil to throw down a Nusance. Or to take my Cattel, which the Plaintiff put in his Ground. To throw down the Plaintiffs House on Fire, next mine. Breaking his Windows or House, to get out, where he imprisoned me. To take a handful of Grain out of his heap, who took one out of mine, and threw it into his. To carry away his Grain or Mony which he threw into my heap. To chase his Cattel with a Dog out of my Ground, Damage feasant. To throw that into the Plaintiffs Ground which he threw into mine. That my Cattel took a mouthful, &c. of his Grals, passing in the way I had over his ground, against my will. Throwing Goods into the Thames, out of a Barge to save the Lives of the Passengers. To fetch out of the Plaintiffs Ground, the Trees he granted me. To dig his Ground to mend my Pipe there. That I hunted Cattel out of my Ground with a Dog which against my will run into his Ground, I rating and recalling him. A Prescription to cut Grals in the Plaintiffs Ground, lying nigh the Church, to estrow the Church, being but an easement.

Distress by a Stanger as Bayliff, and the assent of the Party. By the command of the Chief Justice, Order of Chancery, &c. Rolls Tit. Trespass. 559. That the Plaintiff ought to Impale against a Forest, and for default of Pales, the Beasts went in, and the Forester fetched them out. These

These are justifications and excuses that must be pleaded, and cannot be given in Evidence upon Not Guilty, unless it be in mitigation of Damages.

Trespass lies for Goods stolen, although the Thief be Convicted of Felony. Latch 144. Markhams Case, and so I knew my Lord Hales held, although in Rolls Tit. Trespass 557. 'tis said, if it appears on the Evidence that it was Felony, Trespass lies not. Which I think is not Law. Trespass. Felony.

A man who sows the Lands to halves with the Owner, or three agree to sow the Land, where two of them have no Interest, and a Stranger take the Corn, they cannot joyn in Trespass, having no interest but an Agreement, but the Owner only must bring the Trespass. Cro. 3 part, 143. Goldsb. 77. Sows to halves.

Upon reversing an Outlawry, the Party is restored, and may have Trespass; but upon reversal of a Judgment the Party shall only be restored to the Mony for which the Sheriff sold his Term, upon a Fieri fac. Cro. 3 part, 270. Outlawry reversed. Tenancy in Common.

Upon Not Guilty in Trespass, Quare clausum fregit, at the Tryal the Defendant shall not say, that the Plaintiff is Tenant in Common; he should have pleaded this, and hath now lost this advantage; and if the Jury find it, their finding is not material. Cro. 3 part, 554. Where Tenants in Common shall joyn in an action and where not, and what actions the one shall have against the other. See 1 *Inst.* 197, 200. *&c.*

A Man sells all his Woods standing, growing, &c. upon the Premisses, to hold during the Life of the Vendor, rendring Rent; the Vendee cuts down all the Trees: if he cuts Wood afterwards growing in the same place, the Vendor may have Trespass. Leon. 3 part, 7. Woods.

If a Carrier lose Goods, a special Action of the

Trover against a Carrier.

the Case lies against him, but not Trover, Rolls Abr. 6. so of a common Carrier by Boat. Noy. 114.

Copyholder.

Trespass lyes for a Copyholder against the Lord for cutting down Trees, that he the Tenant ought to have for repairs. Godbolt 173.

Estray.

By seisure of an Estray, the Lord hath but the Custody and not the Property, and therefore if he works the Horse, Trespass lyes. Yelverton 96, 97.

Continuando.

Trespass with a continuando, cannot be for taking a Horse, nor ten Trees &c. nor without a re-entry of the disseised, unless his re-entry be taken away by the Act of God, or the Estate be determined so as he cannot enter, as if Tenant pur auter vie be disseised, and cestuy que vie dye, for there his entry is taken away by the Act of God; otherwise if it be taken by his own act, as if he release to the disseisor, &c. 19 H. 6. 28.

Parco fracto.

Upon non cul. No Park by Prescription or Grant is good Evidence. 18 H. 6. 22.

Park. Warren.

General Trespass for breaking his Park, and taking his Deer, &c. doth not lye at Common Law, but a Writ is given by the Statute West. 1. cap. 20. So if A. have a free Warren in the Soil of B. A. shall not have Trespass, but case for entring the Warren and stopping the holes, &c.

Commoner.

A Commoner cannot have Trespass for the Grass.

False Imprisonment.

After a Supersedeas shewed to the Bayliffs, false imprisonment lyes against them, not against the Sheriff; so against the Bayliff of a Franchise, if he take other Mens Goods in execution upon the Sheriffs Warrant, not against the Sheriff, nor against the Party, unless he procure the Bayliff to take the wrong.

Possession. Entry.

He that hath the Freehold in Law, unless he hath actual possession cannot have Trespass. Therefore the Heir cannot have Trespass against the

the abater, nor against Tenant at sufferance before hath entred, and only from that time: But an Executor or Administrator shall, by relation, have Trespass from the death of the Intestate, &c. But a disseisée after entry shall have an action for all mean Trespasses from the disseisin, even against Strangers, for he is restored to the possession ab initio. Relation.

Trespasses cannot be maintained against him who comes by the Goods lawfully, as by the Plaintiffs delivery, or under that, or by act in Law, &c. but Detinue. But Trespass lies against Tenant at will, or him that I lend my Goods to, who destroys them; for thereby the privity is determined. It lyes against a Miller for taking Toll where none is due; for taking my Servant out of my service; for rescuing one taken at my suit out of the Bayliffs hands, for the Bayliff is my Servant. For beating my Wife or Servant per quod, &c. Not against him that J.S. sells my House to, or has my Goods from the Sheriff, although the Sheriff took them wrongfully. It lies for hunting a Fox, &c. in my Ground. Against Church-wardens, who act by the Justices of the Peace's Warrant, if the Warrant be not good. Trespass.

For digging so near my ground that it fell into the Defendants pit: But not that my House fell into the pit, for 'twas my fault to build so near another mans ground: For entring my ground, to take out his Falcon, which flew thither after Game. For killing my Tumbler in his Warren.

Although I sell the goods, it lyes for a Trespass done before. Tender of sufficient amends before the action brought, is a good Bar, for a negligent Trespass, not for a voluntary one. Time. Bar.

If

Ab initio. If a man enter inter into a place by authority of Law, and abuse this authority, he is a Trespasser ab initio, for his first entry shall be intended for this purpose. As if the Lessor enter to view Waste, and stay all night. If the Kings Purveyor sells my goods. If the searcher abuses my Stuffs. If a man will stay in a Tavern all night. If he detains a distress after amends tendred before impounding. If a Bayliff refuse Bayl Trespass doth not lye against him ab initio, but case; for the Sheriff or under-Sheriff, not he, ought to take Bail; not against the Party nor Bayliff, or person in aid, if the Sheriff doth not return his Writ of Latitat, or makes a false return; but it doth against the Sheriff: So of an Officer of an Inferior Court.

If the Lord work an Estray, Distress, &c. Or Executors find a Bond and cancel it, thinking it was discharged and it was not; they are Trespassers ab initio, although they came lawfully to the possession at first. Rolls Tit. Trespass 563.

Lunatick. The Lunatick (and not the person to whom he is committed) must bring the action in his name for a Trespass done in the Land. Brownl. 1 part, 197.

Note, The Chapter of Verdicts gives much light to know what Evidence is good and what not. The knowledge of Evidence is so beneficial, and necessary, for all practisers in the Law, that none can know too much, be too well versed, or too often conversant in it. Therefore to compleat this Treatise, especially in this particular, I have drained the Law-Books of all, or the most principal Cases relating to it; and have added some Observations very fit for the Unlearned to know, and I hope not fit for the Learned to reject.

THE

THE

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